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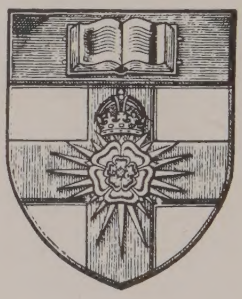

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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RULE UNDER CRIMINAL APPEAL ACT.

Rule 35 a..... 49

ERRATA.

Page 52, line 10. For "s. 6 (1)," *read* "s. 1 (6)."
Page 61, line 13. For "matter," *read* "latter."

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE BANKES.

The Lord Chief Justice, before the first case was called on, said that many notices had been given alleging misdirection as a ground of appeal, in which it was not stated what the alleged misdirection was. The Court wished it to be understood that in notices alleging misdirection the misdirection must be clearly indicated either by setting out the passage complained of or by referring to such passage, or in some other way calling attention to what was alleged to constitute the misdirection.

JOHN JONES.

1910
28 *November.*
John Jones.

Severity of sentence.

The Court of trial has no power to impose a sentence of three years' penal servitude merely to give itself jurisdiction to order preventive detention.

This was an application for extension of time for appeal against sentence, referred by Lush, J. Appellant was convicted on October 19th, 1909, at the Brecon County Sessions, of larceny, and of being a habitual criminal, and sentenced to three years' penal servitude and five years' preventive detention.

Douglas Lewis for the applicant (under s. 10 of the Criminal Appeal Act), who was present.

It is true the applicant is out of time, but he is, in his own words, "no scholar," and had no idea he had any right to appeal. He was convicted on two indictments: on the one of stealing two shirts, the property of another John Jones; on the other of being a habitual criminal. He is a man of 65 years of age, and the question here is whether the Chairman was justified in

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John Jones.

awarding a sentence out of all proportion to the gravity of the crime, merely in order that he might superimpose a term of preventive detention. Three years' penal servitude is altogether too heavy a sentence for this simple larceny. The point was raised in *Sweeney*, 4 Cr. App. R. 70 (1910), but not decided, as the record of the appellant in that case was held to warrant the term of penal servitude.

There were several previous convictions against the present applicant, but there had been a four years' interval between his conviction in 1897 and his next conviction. It is true there were previous convictions in 1902, and almost every year up to 1908. But I ask the Court to remit the five years' preventive detention, on the ground that the Chairman had no right to pass so severe a sentence as three years' penal servitude for so trivial an offence. It was only by passing a sentence of at least three years' penal servitude that the Court below could give themselves power to add a term of preventive detention. He had only been out of prison two months; but evidence can be given to shew he did try to obtain work. I repeat that the sentence was too severe for the offence, especially when it is seen that the shirts he stole had been hanging out all night.

A. J. Lawrie, for the Crown. Although the offence might seem to be trivial, the applicant had stolen both the shirts there. *Sweeney's* case is not against me on the question whether the Chairman could inflict a severer sentence with a view to giving a term of preventive detention in addition. It has never been held that a judge cannot do that. A large discretion has been given to the Courts as to the length of the sentence of preventive detention. In all probability the Prevention of Crime Act, 1908, intended that that discretion should extend to the previous sentence. The Court can of course remit the preventive detention altogether, and allow the penal servitude to remain.

The Lord Chief Justice: This case raises the point left open in *Sweeney*, 4 Cr. App. R. 70, whether the Court at the trial has power to increase the sentence it would pass in the ordinary course in order to give itself jurisdiction to award a sentence of preventive detention. In our opinion the judge at the trial has no such power; the sentence in respect of the offence for which the

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28 *November.*
John Jones.

prisoner stands charged should depend on the nature of that offence, and should be the same as the Court would impose if there were not going to be any term of preventive detention in addition.

This conclusion follows from s. 10 (1) of the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59. That seems to mean penal servitude on the merits. Therefore in all these cases, before the question of preventive detention is considered, the Court must be satisfied that a sentence of penal servitude is appropriate. We have no doubt in this case that the sentence of three years' penal servitude was quite proper, for the applicant had been previously convicted no less than twelve times. It is quite true that there was a period of four years after 1897 during which he did not come under the arm of the law. But after that period there follow seven serious sentences, including eighteen months' imprisonment with hard labour, and three years' penal servitude. In these circumstances the Chairman had a right to treat him as a man to be sent to penal servitude again.

Then there is a question whether we ought to interfere with the term of preventive detention. He had only been out of prison two months when he committed this offence. In all the circumstances we do not think we ought to interfere with this part of the sentence either. Experience alone can show whether it will have any good effect.

The application must therefore be dismissed, and the sentence will run from the date of conviction.

Application dismissed.

A. R.

CHARLES BENJAMIN ROBERTS.

Charles Benjamin Roberts.

Severity of sentence.

This was an appeal against sentence by leave of Ridley J. Appellant was convicted at the Staffordshire Sessions on October 18th of receiving a bicycle, knowing it to have been stolen, and sentenced to twelve months' imprisonment with hard labour.

The appellant, who was not represented, was present.

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28 *November.*
Charles Benjamin Roberts.

Carmichael for the Crown. There was no previous conviction for receiving. There were three prisoners indicted in connection with the transaction, the other two being the son and the nephew of appellant. The nephew was the man who actually stole the bicycle. It does seem probable that the Chairman had in his mind the fact that it was the nephew who stole the bicycle, and therefore that an example should be made of the elder man.

BANKES J.: In this case appellant was sentenced to twelve months' imprisonment with hard labour, and against that sentence he appeals. In awarding the punishment the learned Chairman said, "There is nothing previously against you of a serious nature." The Court considers in all the circumstances, and taking into account the fact that the only previous convictions were for being drunk and disorderly, that the sentence was too severe, and ought to be reduced to one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. R.

John Sullivan.

JOHN SULLIVAN.

Severity of sentence.

When a prisoner, convicted on one charge, is to be tried for an offence committed before he is convicted, he ought to be tried at the earliest possible moment, and the trial ought not to be delayed until his sentence has expired.

This was an appeal against conviction and sentence by leave of Ridley J., and an application for leave to call further evidence. Appellant was convicted at the North Riding Sessions on 20th October, 1910, of housebreaking, and sentenced to three years' penal servitude.

G. H. Mills for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was charged, together with Thomas Edward Powell, with feloniously breaking and entering the dwelling-house of Walter Kirkham, and therein stealing some jewellery and some £40, being the goods and money

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John Sullivan.

of the said Walter Kirkham. Powell was acquitted. The evidence against appellant was that in his room were found a pawn-ticket relating to a gold buckle ring, which belonged to Mr. Kirkham, a bunch of keys, also belonging to Mr. Kirkham, a skeleton key, which was said to fit the door of the house broken into, an electric flashlight, and an implement said to be a jemmy, but really a piece of iron filed away and converted into a jemmy. It was said that the dresser drawer, which was forced open, bore upon it marks which corresponded to the filing down on the so-called jemmy. Nothing else of the stolen property was found. Appellant's case was an *alibi,* and witnesses can be called to prove that he was seen in a doorway leading to some lawn-tennis courts on the night of the robbery.

I further submit that the summing up of the Chairman did not put appellant's case fairly to the jury. He omitted to put the defendant's case that he was never near the place. The ring, the subject of the pawn-ticket, was his own, and purchased by himself. He can produce a witness who was with him when he bought it.

He puts a false colour on the whole case by saying that the "jury have a right to assume that he was the person who did in fact break into the premises." How can the jury have any right to draw such an inference merely from the fact of the appellant being outside?

[PICKFORD J.: You must take that sentence with the rest of the summing up.]

I repeat it is likely in itself to give the jury a totally wrong view to say they have a right to assume something, when it is only a matter of evidence for them.

[The LORD CHIEF JUSTICE: As to the further evidence he now desires to call, he never said before the magistrates that he wanted other witnesses.]

He asked the police before the trial actually came on. As to the sentence, I desire to point out that the prisoner was previously convicted at Durham on July 5th, 1909, of office-breaking, and sentenced to fifteen months' imprisonment with

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28 *November*
—
John
Sullivan.

hard labour; that the trial for the present offence, which was committed on February 5th, 1909, did not take place until the appellant had completed his sentence of fifteen months. The result is that a sentence of penal servitude follows immediately on a long sentence of hard labour, and furthermore, I submit that had the Chairman of the Durham Court known of the present offence, which was earlier in date than that he was trying, the offences would have been taken together and a different sentence passed.

G. F. Mortimer, for the Crown. February 5th, 1909, was the actual date of the robbery, but it was not till July 15th, 1910, that appellant was identified as having been on the spot. It is quite true, however, that certain facts connecting him with the robbery were in possession of the police before he was tried at Durham. He should undoubtedly have been put on his trial earlier. There is a Home Office circular advising the police authorities to deal with all pending offences in cases like these together, so as to give a man a clean sheet on coming out of prison.

PICKFORD J.: In this case appellant appeals against both conviction and sentence. With regard to the evidence in support of this conviction, we think there was ample evidence on which the jury could proceed. As to the summing up of the Chairman, we are of opinion that no objection can be taken beyond saying that one or two sentences do seem to be somewhat misleading if taken by themselves. Of course one could not say that if a man were seen outside a house that had been broken into the jury would have a right to assume that he was the man who had broken in. And again, if goods were stolen in the house that had been broken into, you could not say that the fact of the man being outside was a fact from which you had a right to draw the inference that he stole the goods. But we must not take each sentence literally and in isolation from the context. If we take the whole summing up together, we shall find there is really nothing misleading.

As to the sentence, a question arises in somewhat unusual circumstances. The appellant had been convicted of an offence at Durham on July 5th, 1909, and was sentenced to fifteen months'

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28 *November*.
—
John
Sullivan.

imprisonment with hard labour. At the time of this conviction the police had information connecting the appellant with the offence committed on February 5th, 1909, from the conviction for which he now appeals.

I think this Court has said on more than one occasion that in circumstances of that kind it is not right to keep the other charge hanging over the prisoner's head, and that you should proceed with the other charge during the time he is serving the sentence for the first offence. That course has been pointed out as an advisable one by the circular of the Home Office dated 20th August, 1906. For some reason that was not done here, and the appellant was not charged until he came out from his sentence on the Durham conviction. Then the sentence passed upon him for the offence was three years' penal servitude, which thus follows on a sentence of fifteen months' imprisonment with hard labour. That sentence would in all probability not have been passed if appellant had been tried at the proper time, viz., while serving his sentence on the earlier offence. No doubt one of the very reasons that operated with the Chairman in passing a sentence of penal servitude was the fact of this previous conviction. Had the present offence been taken into consideration by the Durham Court in passing sentence we do not think any sentence equivalent to fifteen months' imprisonment with hard labour, followed by another sentence of three years' penal servitude, would have been passed. There was no previous conviction of any substantial gravity against this appellant, and therefore we will reduce the sentence to one of nine months' imprisonment with hard labour.

Sentence reduced.

A. R.

1910
28 *November.*

William Boughton.

WILLIAM BOUGHTON.

Evidence of a document alleged to contain some kind of confession by the defendant but admittedly sent to him to sign under an inducement that if he did he would not be prosecuted, ought to be wholly excluded from the jury, and, if the judge directs the jury that this document may have a bearing on the guilt of the defendant, it is a ground for quashing the conviction.

A conviction may be quashed on a point of law not taken at the trial.

This was an appeal against conviction, referred by the Home Secretary. Appellant was convicted at the Gloucestershire Assizes on October 26th, 1910, before A. T. Lawrence J., of attempted carnal knowledge of a girl under 13, and sentenced to four months' imprisonment in Division II.

Cranstoun for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Appellant, who is 16 years of age, was indicted for attempted carnal knowledge of a girl 9 years and 6 months old, and there was a second count for indecent assault. The story of the girl is improbable, and lacks corroboration. The verdict was against the weight of evidence, and I shall submit that there was misreception of evidence and misdirection.

The appellant was in the habit of driving the child in his milk cart part of the way to school. The child's story was that at 7.45 a.m. on Monday, September 19th, 1910, the prisoner was driving her to school, when he stopped the cart, tied the reins to the post of a gate, took the girl into a field, undid his and her clothes, and attempted carnal knowledge. She arose almost immediately, and, according to her statement, then shewed the appellant some blood on her clothes. The child admitted that she did not cry, and in reply to the question whether she was hurt, said, "No, not much." She went to school as usual, and made no complaint either on the Monday or the Tuesday following. She went to school on Tuesday, and, according to appellant, went in his cart as usual. On Wednesday evening her sister for the first time noticed the blood on the child's clothes, and communicated the fact to her mother. The child made a statement to the mother implicating the appellant. The mother then went

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William Boughton.

to see the prisoner, who denied he had done anything to the child. Nothing further was done until the Friday following, when a doctor happened to be visiting a neighbouring house. The mother took the girl's clothing and shewed it to him. It was proved that the blood covered a space eight inches square, and was such a quantity as would require a considerable amount of violence to produce. She afterwards saw the prisoner and told him he must write her an apology, and that if he did so neither the child's father nor she would prosecute him, and according to the mother he promised to do so. When asked why she did not take the child to the doctor, she said she did not desire that the matter should be brought into court. There the matter stood until Thursday, September 29th, when the police, having heard rumours, came and took the girl and her mother to the doctor.

On the same day the mother wrote out a form of apology and sent it to the prisoner. The father of the girl had said to the prisoner that if he wrote the paper he would not be taken into custody. The prisoner refused, but retained the paper. On the next day a boy was sent to the appellant, and the appellant gave the paper back to the boy unsigned. The paper was not produced at the trial. The doctor's evidence shewed that the hymen was intact, there was no abrasion, and everything was normal. There was no corroboration of the statement that the blood was produced on the day of the alleged assault.

I submit on these grounds that the verdict was against the weight of evidence, and that evidence relating to the apology was improperly received.

Appellant gave evidence that he sent the paper back as soon as it was asked for. Notwithstanding the inducement he refused to sign it. I submit that the learned judge should have told the jury to eliminate the whole question of this apology from their minds. Assuming that the prisoner had signed the alleged apology, it would have amounted to a confession obtained under an inducement held out by the child's parent, and would, therefore, have been inadmissible.

[PICKFORD J.: But it was not put before them as a confession.]

It was regarded as evidence from which a confession might

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28 *November*.
William Boughton.

be implied, and the learned judge treated it as having a bearing on the prisoner's guilt or innocence.

The point did not occur to me at the trial because it was admitted that the appellant had consistently refused to sign any apology, and no document was produced. This positive refusal was not, I submit, sufficiently put to the jury.

S. Hutton, for the Crown. The answer to appellant's contentions as to the apology is that appellant was prepared to accept the mother's conditions, but the matter had passed into the hands of the police.

There can be no question of surprise here, for before the girl's mother asked him to apologise she had twice accused him of having committed the offence, and even assuming that the request for an apology amounted to an inducement to confess held out to appellant, that does not of itself make the confession inadmissible, unless the inducement in fact operated to produce the confession. There may be an inducement that does not induce, and the conduct of appellant when looked at as a whole shewed that he was not influenced by the demand for an apology. I cannot contend that, if anything of the nature of a confession was obtained from appellant by an inducement which did in fact induce, the jury might not have been influenced by it, as the learned judge undoubtedly devoted a considerable part of his summing up to that piece of evidence.

The Lord Chief Justice: We think this conviction must be quashed, and upon a ground which did not present itself to Mr. Cranstoun at the trial. I say nothing about the facts of the case. We have before us now the document which was not produced at the trial. It is not signed by the appellant, and as the judge stated to the jury, the child's mother did not pretend that it was signed by him.

We have therefore evidence referring to a document not put before the jury which has a material bearing on the question of the guilt of the prisoner. Suppose this document had been signed and amounted to a clear admission of guilt, would it be admissible in the circumstances in which it came into existence? [His Lordship then referred to the summing up on the facts of the document coming into existence.] The learned judge was clearly treating it as if it had a direct

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bearing on the guilt or innocence of the prisoner, for he said—on the assumption that the mother was telling the truth—that the appellant would not have promised to write it out unless he had had something to do with the crime. Therefore it was regarded as a piece of evidence amounting to a qualified confession, or an admission amounting to a confession, or a statement from which a confession or admission could be implied. It has been conclusively established that if that kind of admission has been obtained under any inducement held out by a person in authority, *e.g.* where a police constable or a witness promises that if the prisoner will sign an admission there will be no prosecution, the admission so obtained is inadmissible in evidence. In all probability a person charged would be willing to say or do a good deal to prevent certain matters being brought up. If we thought that this incident of a half-confession or admission or promise to apologise did not or could not affect the minds of the jury, so that, apart from it, there would still have been a conviction, we should not interfere. But it seems to us that the learned judge did attach great importance to it, and the jury probably did so, too. In these circumstances the appeal must be allowed.

Conviction quashed.

A. R.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PICKFORD AND MR. JUSTICE BANKES.

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WILLIAM TAYLOR.

There may be sufficient asportation to constitute larceny without the entire removal of the thing stolen from the physical possession of the owner.

This was an appeal against conviction by leave of the full Court obtained on November 21st. Appellant was convicted on June 28th, 1910, at the Wiltshire Quarter Sessions, of larceny, and of being a habitual criminal, and sentenced to three years' penal servitude and five years' preventive detention.

Acton Pile for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted in two counts, one for stealing from the person, the other for simple larceny. The facts were that Mr. Barnes, the prosecutor, was on the 2nd June, shortly after half-past eight, on the platform at Warminster Station, together with a little girl of eight, looking for a carriage, when appellant put his hand into the trousers pocket of the prosecutor, seized his purse containing 8*s.* 9*d.* in money, and pulled the purse up to the edge of the pocket. When the purse had been pulled up to the edge of the prosecutor's pocket, the corner happened to catch on a belt worn by the prosecutor, whereupon the latter grasped the purse out of appellant's hand, put it back into his pocket again, and turned in pursuit of appellant.

The grounds upon which this appeal is based are (1) misdirection, and (2) that the evidence, if true, would not in law sustain a verdict either of larceny from the person or simple larceny. The jury convicted of larceny from the person.

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As to the first ground. In his summing up the Chairman said to the jury: "If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge," *i.e.*, larceny from the person. My submission is that there must be a severance from the person to sustain the offence of larceny from the person.

[DARLING J.: Was there not a simple larceny?]

I submit that the Chairman ought to have directed the jury that if they were not fully satisfied on the evidence that there was sufficient asportation to support the charge for simple larceny they could find him guilty of the attempt. The point is important in this respect, that had the jury returned a verdict for attempt only, the Court could not have imposed a sentence of three years' penal servitude, and therefore would not have been enabled to superimpose a term of preventive detention. There was no evidence of asportation, seeing that the purse never was in the actual possession of appellant.

[DARLING J.: If the appellant got hold of the purse, actually got it into his own hand, why was there no larceny? What more was wanted?]

If a man could have abstracted the article he was trying to abstract from the prosecutor's pocket, or would have succeeded but for the fact that the prosecutor stopped him, then there would be sufficient asportation. But if in the interval of time between the attempt and the time he was stopped by human agency, there had been a physical or inanimate obstruction, it could not be said the man ever had entire and absolute possession of the article. *Wilkinson*, 1 Hale, P. C. 508 (1598); *Thompson*, 1 Moo. C. C. 78 (1825); *Simpson*, Dears. & P. C. C. 421; 24 L. J. M. C. 7; 6 Cox, C. C.; (1854); C. C. R.

[DARLING J.: The prosecutor says: "I grasped it out of his hand, put the purse back in my pocket, and tried to catch him."]

He pulled it up to the edge of the pocket; it lodged in the belt. The belt was the physical obstruction.

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[PICKFORD J.: It prevented him from taking it for a moment. But it was not otherwise held by any fastening.]

You cannot go into the balance of probability whether the purse was in the bottom or at the top of the pocket. It did remain "fastened" in a manner of speaking. This case is much nearer *Wilkinson's* case than *Thompson's*. In the latter case it was held that to constitute a stealing from the person the thing must be completely removed from the person. Removal from the place where it was, if it remains throughout with the person, is not sufficient, though such asportation would be sufficient for simple larceny. But in *Thompson* there was nothing in the nature of inanimate obstruction to prevent the complete removal of the book from the pocket. In *Wilkinson's* case the thief was unable to carry off a purse on account of some keys attached to the string of it getting entangled in the owner's pocket. Held, there was not sufficient asportation because no severance.

Lapier's case is not against me, because there was a severance in that case, and a momentary entire and absolute possession on the part of the thief. 1 Leach, 320; 2 East, P. C. 557, 708 (1784). There would have been sufficient asportation if there had been nothing except human agency to prevent the complete removal; but I submit in this case appellant never had the entire possession for one moment.

[DARLING J.: You are only arguing that he was guilty of the attempt to steal.]

Then I say there was misdirection because the learned Chairman omitted to direct that on the evidence the jury could find him guilty of the attempt only.

A. J. Lawrie for the Crown. I submit the confusion in this case arises from the fact that all the cases quoted are cases of larceny from the person. The asportation necessary to support simple larceny is a great deal less than in larceny from the person. *Coslet*, 1 Leach, 236 (1782), is in point. The Court there held that as the prisoner had removed the property from the spot where it was originally placed and the jury had found that the removal was with intent to steal, there was sufficient taking and carrying

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away to constitute the offence of larceny. Again, removing a bag from the bottom of the boot of a coach, the prisoner completely removing each part of the bag from the space that specific part had previously occupied, was held complete asportation in *Walsh*, 1 Moo. C. C. 14 (1824). I submit that in simple larceny it is not necessary that the goods should be removed entirely out of the possession of the owner into that of appellant.

[BANKES J.: If the purse is only in the pocket of the owner can it be said you have removed it?]

Yes. My submission is that the possession of the owner is destroyed when the hand of the thief is in his pocket.

Acton Pile, in reply: The waggon cases are on quite a different footing from the present case. There must be severance to sustain the conviction against appellant. See Archbold, 24th ed. p. 537.

PICKFORD J.. In this case the appellant appeals against conviction of larceny from the person and as a habitual criminal, for which he was sentenced to three years' penal servitude and five years' preventive detention. Mr. Pile objected that there was not sufficient evidence to support the conviction for larceny, and further, that the Chairman misdirected the jury. He argued that the evidence was only sufficient to support a verdict of attempted larceny, for which the appellant could not be sent to penal servitude, and, consequently, could not be sentenced in addition to a term of preventive detention. The evidence was not stated absolutely accurately by the Chairman in his summing up, but nevertheless the summing up was substantially accurate. The Chairman said: "He was looking for a carriage with a little girl of eight when the defendant came behind him, put his hand in his trouser pocket and pulled the purse out of the pocket, when it caught in his belt. Then Mr. Barnes, as he puts it in his own phraseology, said, 'I grasped it out of his hand, put the purse back in my pocket and tried to catch him.'" That was not an absolutely correct way of stating the facts on the evidence, for the evidence was that the purse was not pulled out of the pocket, but only up to the edge of the pocket. Still it was a substantially

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William Taylor.

accurate direction. The Chairman also said, "If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge." The full charge, of course, was that of larceny from the person. That direction is not correct, in our opinion. It does not deal with the question of asportation at all. What the Chairman says amounts in effect to telling the jury that even if there is no removal from the pocket, still, if the article is actually in the hand of the prisoner, that would be sufficient to constitute larceny from the person. That is wrong, in our opinion. The Chairman then goes on to state the appellant's story, and winds up by saying: "It is for you to consider whether the defendant has given an explanation of the circumstances of what occurred after Mr. Barnes turned on him, and it is for you to say which of the two stories you believe." The jury believed the story of the prosecutor, and they found the appellant guilty of larceny from the person. They did that on a misleading direction, but nevertheless it is quite clear that they must have found their verdict on the facts as the prosecutor stated them, viz., that appellant had taken the purse in his hand, and had lifted it from the bottom of the pocket to the edge of it, where it caught in the belt. These facts were sufficient to constitute simple larceny. The cases establish that if a man puts his hand into another's pocket, and removes a purse from the position in which it originally was to the edge, and is only hindered from obtaining full possession of it because it accidentally catches in the belt, there is a sufficient asportation to constitute larceny.

In these circumstances, under s. 5 (2) of the Criminal Appeal Act, 1907, we have the power to substitute for the actual verdict the verdict which the jury could have found, and to pass such a sentence in substitution as the substituted verdict warrants—not being one of greater severity.

We are of opinion that the jury must have been satisfied that the facts were sufficient to establish a simple larceny.

Therefore under s. 5 (2) we substitute a verdict of larceny for the verdict of larceny from the person, and as it is competent for us to pass a similar sentence of penal servitude as that passed at the trial, we do so in this case.

On that sentence the Court below would have power to deal with the appellant as a habitual criminal. As the jury had

found appellant guilty of being a habitual criminal, and that conviction cannot be questioned, we think that the result of this appeal must be that a verdict of simple larceny be substituted for the original verdict, and that the sentences should stand.

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William Taylor.

It was argued that the jury ought to have had an opportunity of returning a verdict of attempted larceny. It is perhaps not unimportant to note that that point was not suggested to the Chairman, though of course that fact would not excuse him if the question had arisen. In these circumstances the appeal must be dismissed.

Verdict varied.

A. R.

HENRY HOWARD.

Henry Howard.

Order to pay costs of the prosecution discharged on evidence of appellant's want of means.

This was an appeal, by leave of the full Court, granted on November 21st, against an order to pay costs.

Appellant was convicted on September 24th at the East Sussex Sessions of obtaining money by false pretences, and sentenced to eighteen months' imprisonment with hard labour, and to pay the costs of the prosecution. Evidence was given at the trial that appellant was worth five or six hundred pounds.

Appellant, who was unrepresented, was present, and stated that he had no means, and was swamped in debt. He was allowed to call his brother to speak to the true state of his affairs.

William Howard deposed that appellant had a little land situate near Dublin, that part of it had been sold, and that its selling value was £200. That was all the property the appellant had, and that when all his just debts were paid, he would have no assets whatever. There were secured and unsecured liabilities, bills and mortgages upon the property.

[BANKES J.: Have you had a valuation?]

There has been a valuation, and the best offer has been £200. The value could not possibly be higher.

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[PICKFORD J.: Is that the gross value, without allowing for the debts secured on the property?]

That is so. The property comprised an eighth undivided share. There was a mortgage of £45 secured on it, a bill of exchange for £20 and £10, legal expenses, £10 and £15, and unsecured liabilities such as tailors' bills. The costs of the prosecution amounted to £50. The just debts on paper amounted to more than £200.

Bompas, for the Crown, drew attention to the evidence at the trial of appellant's means.

DARLING J.: In this case the appellant was convicted of obtaining money by false pretences, and sentenced by the Common Serjeant of London, sitting as Deputy-Chairman of Quarter Sessions, to eighteen months' imprisonment with hard labour, and to pay the costs of the prosecution.

The sentence of imprisonment will stand, but the order to pay costs seems to have been made under a misapprehension. The evidence before the learned Common Serjeant at the time was that the appellant was a person of considerable means. If that had been so, the order to pay the costs would have been a proper one.

We think the appellant is not in a position in which it would be consistent with fairness to his other creditors, to order him to pay these costs. The result of the order of the learned Common Serjeant would be to take the money from those who before the order was made were entitled to it. Therefore the order must be discharged. The sentence will run from the date of conviction.

Order to pay costs discharged.

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE AVORY.

OLIVER SMITH.

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Oliver Smith.

No general rule can be laid down at which stage of the trial it becomes the duty of the prosecution to proffer evidence of sanity, when there is reason to believe that insanity will be relied upon as a defence.

The appellant was convicted at the Central Criminal Court on the 17th November, 1910, of the murder of a woman with whom he had been living. He appealed against his conviction on the ground that Darling J. had misdirected the jury as to the defence of insanity which had been set up.

John O'Connor for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The defence of insanity was set up both by cross-examination of the witnesses for the prosecution and by direct evidence of his family and personal history. No doctor was called for the defence, but Dr. Dyer, the prison doctor, was, by leave of the Court, called to rebut the suggestion of insanity. The judge, however, refused to allow other witnesses to be recalled to speak to the conduct of appellant immediately before the murder.

R. D. Muir and *W. H. Leycester,* for the Crown, were not called upon.

THE LORD CHIEF JUSTICE: This is an appeal on the ground of misdirection. It is not necessary to go into the facts, for it is not disputed that prisoner killed the woman, nor that he made a confession such as a man moved by remorse might have made. [His Lordship then read passages from the summing up of the

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learned judge.] The Court could see nothing which could be said in any way to have misled the jury; there was a proper direction as to insanity, and a proper summary of the facts. The onus of proving insanity is upon the defence, and it is not for us, but for the jury to deal with the question of the prisoner's sanity or insanity. There is no ground for thinking the verdict in this case was improper; certainly there was no misdirection, and the appeal must be dismissed.

Muir then asked the Court for a direction as to the duty of counsel for the Crown with regard to tendering evidence of a prisoner's sanity.

He stated that after evidence of appellant's insanity had been given for the defence, he asked leave to recall certain of the witnesses for the Crown who had not been cross-examined as to the prisoner's state of mind, and who had been for several months immediately before the crime in daily contact with the prisoner, in order that they might be examined on this point, and to call the prison doctor, and that counsel for appellant had objected. Darling J. allowed the doctor to be called, but declined to allow the other witnesses to be recalled.

Counsel cited *Bunyan*, 151 Sess. Papers C.C.C. (Sept. 1909), where Lord Coleridge J. had allowed him to call the prison doctor to prove sanity, no evidence of insanity other than by suggestion in cross-examination of the Crown witnesses having been offered by the defence. He suggested that the proper course was that pursued in *Rayner's* case, (1907) 146 Sess. Papers C. C. C. at p. 734, namely, to submit at the close of the evidence for the prosecution that there was no evidence of insanity, and not to call any evidence of sanity unless the judge ruled against the submission.

[The Lord Chief Justice: The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit.]

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Oliver Smith.

The question is, is it right or is it not, where there is some suggestion of insanity, for counsel for the Crown to ask for a ruling as to whether or not there is evidence of insanity to go to the jury?

The Court stated that the only general rule that could be laid down was that insanity, if relied upon as a defence, must be established by the defendant.

Appeal dismissed.

W. B.

GEORGE HENRY RICHARDS.

George Henry Richards.

Where possession of real property is obtained under a written agreement animo furandi, *there may be a conviction for stealing the fixtures under s.* 31 *of* 24 *&* 25 *Vict. c.* 96, *the Larceny Act*, 1861.

Munday (2 *Leach*, 850; 2 *East P. C.*, 394; 1799) *followed.*

Appellant was convicted on the 24th October, 1910, at the Middlesex Sessions on an indictment under sect. 31 of the Larceny Act, 1861, which alleged that on July 23rd, 1910, he did steal certain leaden and zinc piping then being fixed to certain buildings, of the property of W. H. King. A second count alleged the same offence on another date. He was sentenced to six years' penal servitude and three years' police supervision.

There was a second indictment against appellant under s. 13 of the Malicious Damage Act, 1861, namely, that on the 2nd July, 1910, the prisoner then being possessed of certain dwelling-houses, the property of W. H. King, held at will, did maliciously sever certain fixtures—to wit, a quantity of lead piping and a quantity of zinc guttering then being fixed to the said dwelling-house.

Appellant obtained possession of certain houses, of which King was the lessee from the ground landlord, under a three months' agreement (to be followed by a lease) signed by King. Under the agreement, he was to do certain repairs: meantime he was a tenant at will. Having obtained possession, he removed and sold the stoves, pipes, cisterns, and so on. The houses were

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George Henry Richards.

let at weekly rents to include rates, and appellant received the rent from the tenants, but made no payment to King for rent or rates, leaving the tenants to be summoned by the local authority

The appeal was by leave of Ridley J., against conviction on the grounds of improper admission of evidence and misdirection.

H. H. Lawless for the appellant (under s. 10 of the Criminal Appeal Act, 1910). Evidence was improperly admitted as to non-payment of rent and rates by appellant; all the tenants called to prove the injury to the houses were asked whether they had been summoned for non-payment of rates.

The learned Chairman misdirected the jury in directing their attention to this question of non-payment of rates and rent.

Moreover, appellant was charged with stealing specific property, and the jury should have been told to confine themselves to the subject-matter of the indictment, and evidence should not have been admitted as to damage and other matters which were the subject of a second indictment.

The defence was never really put to the jury at all, and the Chairman gave an incorrect version of the case of *Munday*, 2 Leach 850 (1799), to the jury. This case is distinguishable from *Munday*; there prisoner had given a wrong address, and began to move things within three days.

S. C. N. Goodman, for the Crown, relied on *Munday*, and stated that on the authority of that case which was, he submitted, still good law, appellant was not indicted as a tenant under s. 74 of the Larceny Act, 1861. Appellant never was a tenant properly so called. If he was only in possession by a trick, he was not in fact in possession. The trick was in the letters he wrote—by the general tenor of these letters holding himself out as a respectable and responsible man of substance. He got possession not only by a fraud, but by a trick,—simply *animo furandi*—as the evidence goes to shew that he was never in a position either to do the repairs or to pay rent and rates, and that he never intended to do anything to the property except remove the fixtures, pipes, guttering, stoves, and tanks therefrom and steal them.

Munday was decided on a section corresponding to s. 31 of the Larceny Act. S. 74 only applies to a tenant in actual occu-

pation, so perhaps he could not have been indicted under it. But because the prosecution has not proceeded under s. 74 it is not precluded from proceeding under s. 31.

Lawless, in reply. If *Munday* is right, this case is applying larceny by a trick to real property for the first time. Here there was no false representation as in *Munday*.

Pickford J.: This case really raises the question of whether *R.* v. *Munday* is to be followed. If so, a man who comes within the finding of the jury in that case, which is that defendant had entered into the contract with the lessor for the purpose of getting a fraudulent possession of the house, is guilty of the crime charged in an indictment such as this, if he afterwards removes and sells the fixtures. Here the jury must have found that when Richards entered into possession of the houses he had no *bonâ fide* intention of occupying them, but entered merely for the purpose of stealing the lead, and so on. That, under the direction given to them, is what they must have found.

Evidence as to damage to the other houses was admissible to shew the intention with which the appellant took the houses; we consider that evidence admissible if that was the right question to put to the jury; whether or not that was the right question depends on whether or not *Munday* is to stand. That case is unsatisfactorily reported, there are no arguments and there is no judgment, but the judges did affirm that conviction. It is a case which was decided by all the judges in 1799, and has been considered as an authority ever since, and we must uphold it.

If so, though we are not prepared to say that it might not have been better if the learned Chairman had gone into a little greater detail as to the case for the appellant, though the summing up might have been fuller, there was not in our opinion any misdirection nor any miscarriage of justice. The appeal must be dismissed and the conviction upheld.

Appeal dismissed.

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Benjamin Brown.

BENJAMIN BROWN.

On a charge of a sexual offence, the jury must be distinctly cautioned to be careful how they accept the uncorroborated evidence of the prosecutrix.

The appellant was convicted on June 16th, 1910, at Chelmsford Assizes before Phillimore J. on an indictment under the Punishment of Incest Act, 1908, charging him with having unlawful carnal knowledge of his daughter, Constance Brown, on January 3rd and March 23rd, 1910. There was a second indictment alleging a similar offence with another daughter, Lily Brown, which was directed by the learned judge to remain on the file of the Court. Appellant was sentenced to four years' penal servitude, and now appealed, by leave of the full Court, against his conviction.

G. F. Emery for the appellant. The conviction is bad because there was no corroboration of the story told by the prosecutrix. She made no complaint; it is not even suggested that she said anything until asked by the mother, and what she then said was not evidence.

Further, the mother took no steps when she was told; she slept with her husband for a week after, and did not tell the police till after she had had a quarrel with her husband. The dates alleged in the indictment are the 3rd of January and 23rd of March. The mother was not told till March 25th, and she gave no information to the police till March 31st. The girl's evidence was most unsatisfactory.

The learned judge in his summing up referred to the fact of the girl having had frequent connection with someone, and though he stated it was not for the defence to shew who it was, he asked, "Who is it, if it is not the father?"

The learned judge did not touch on the point of corroboration—not statutory corroboration, but the ordinary rule applies that a jury ought to be warned to be very careful if there is no corroboration.

Holford Knight for the Crown. The first question is whether the girl was an accomplice, and so required corroboration.

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[The LORD CHIEF JUSTICE: In *Graham*, 4 Cr. App. R. 218; 74 J. P. 246 (1910), which was a case of carnal knowledge of a girl under sixteen, Channell J., in delivering the judgment of this Court, said: "It is not a case in which corroboration is necessarily required. But it is one of those cases in which the judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person, and in which the judge should point out to the jury that they had one person saying one thing and another person another thing."]

The remaining question is whether there is a substantial compliance with the rule laid down in *Graham* in the summing up in this case; it is true there is no specific warning, but the general tenor of the summing up is a substantial compliance with that case. The learned judge throughout urged the jury to exercise great care.

Emery, in reply. There is nothing in the summing up, no passage can be pointed out, which in any way amounts to a compliance with the rule laid down in *Graham*.

The LORD CHIEF JUSTICE: In this case there has been a very careful trial and the matter has been sifted to the bottom. If we could have seen that certain rules which have been laid down for guidance in these cases had been substantially complied with, we should not have upset this conviction.

[The learned judge then dealt with the facts of the case, and continued:—] There was in this case no complaint at all by the girl until she accused her father after having been questioned by the mother on the Good Friday (March 25th).

In this state of things there were two or three matters as to which the jury ought to have been cautioned. In the first place there is the absence of complaint by the daughter; it is said in answer that the father threatened to kill her and himself too if she said anything, but almost in the same passage of the evidence we hear of her going upstairs to him and having connection on the same night. The improbability of this story was insufficiently explained to the jury; caution is necessary if it be

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alleged that a girl is a consenting party, every time under some threat.

In the second place the jury ought to have been cautioned against accepting the uncorroborated evidence of the girl. In our view the girl was an accomplice, but even if she were not, she was a witness who on her own story had been letting her father have connection with her, and was certainly an abandoned girl.

In this class of case it has been for years an invariable practice to caution juries as to accepting the evidence of such a witness against the testimony of the prisoner.

In the absence of any complaint by a girl of fifteen ravished by her father, where no caution was given to the jury, in our opinion the trial was not satisfactory.

But the jury ought to have been warned that there was no corroboration of the girl's story, and the fact that she made no complaint ought to have been called to their attention.

The appeal must be allowed, and the conviction quashed; but there is another indictment on the file, and we think it ought to be tried.

Conviction quashed.

W. B.

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ALEXANDER McLEAN.

Alexander McLean.

When a defendant has been convicted of an offence and he admits charges of similar offences pending against him, the judge should, as a general rule, take the untried charges into consideration in passing sentence, if the prosecutors of those charges consent. But he has a general discretion, and should consider the nature of the charges, the wishes of the prosecutors, whether or not there has been a committal for trial in another county, and the public interest.

The headnote to Syres (1 *Cr. App. R.* 172) *is too wide in its terms.*

This was an appeal against sentence, leave having been granted by Lush J. Appellant was committed for trial on a charge of arson in Hertfordshire some time before October, 1910. On October 13th, 1910, he was convicted at the Reading Assizes before A. T. Lawrence J. of housebreaking, and sentenced to three years' penal servitude. Before sentence was passed, appellant told the judge of the impending charge of arson, and

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Alexander McLean.

admitted his guilt, and asked the judge to take that charge into account in passing sentence. Subsequently he was tried at the Herts Assizes for arson, and was sentenced by Grantham J. to five years' penal servitude, to run concurrently with the other term. Against this sentence he appealed.

Appellant in person. The sentence passed at Reading was in consideration of the two charges.

Harvey Murphy for the Crown. The judge at Reading had not the facts of the arson charge before him. The two offences for which appellant was sentenced were not of the same nature, and in such a case the judge in the first trial was not bound to take into account the other pending charge, and ought not to have done so. It was desirable that the Court should lay down some general rule for these cases where two or more charges were pending against a prisoner, as the position at present was not clear. See *Syres*, 73 J. P. 13; 25 T. L. R. 71; 1 Cr. App. R. 172 (1908); *Taylor*, 2 Cr. App. R. 158 (1909); *Greig*, 4 Cr. App. R. 151 (1910); *Higson*, 5 Cr. App. R. 167 (1910).

[The Lord Chief Justice: The headnote to *Syres's* case in the Criminal Appeal Reports is too wide in its terms, though the judgment is correctly reported.]

The Lord Chief Justice: Dealing with this particular case, as the appellant admitted at Reading that he was guilty of the charge of arson, and asked the judge to take that into consideration, and that in fact was done, we think that the appellant should have the benefit of the state of things at Reading, and that his sentence should be reduced to one of three years' penal servitude, to run from October 13th, which was the date of the sentence at Reading.

We have been asked for an expression of our opinion upon the proper course to be adopted when there is more than one charge against the prisoner when he is sentenced. It is very desirable that the prisoner should come out of prison with a clean sheet, and therefore that the judge should take into account all the charges in fixing the punishment. We are only dealing with cases where the prisoner admits that he is guilty

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of the other charges against him. When the offences are of the same character, and are admitted, whether there has been a committal or not, the judge is entitled to take them into consideration, and should do so. If the other charges are not admitted, the judge cannot take them into consideration. If they are admitted and there has been a committal, the judge should be satisfied that the prosecution consent to the other cases being taken into consideration, because it is possible that the prosecution may think it desirable that there should be a public investigation of the other charges. If the committal is in another county, and for a different class of offence, and the prosecutors in that county think that the charge should not be taken into consideration, the judge should not take it into consideration. It may be desirable that there should be a trial in each county; and even where the prosecution consent to the other charge being taken into account, the judge must be satisfied that the public interest does not require any further investigation of the pending charge.

Sentence reduced.

N. B.

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CHARLES REYNOLDS.

Charles Reynolds.

The Court will only hear one counsel for the appellant.

The Court cannot order an appellant to pay the costs of the prosecution, unless he has appealed against sentence.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact. Appellant was tried for arson at the Exeter Assizes, and the jury disagreed; at the second trial before Bankes J. at Exeter, on November 1st, 2nd, and 3rd, appellant was convicted and sentenced to five years' penal servitude.

Holman Gregory, K.C. (with him *J. A. Hawke*), for the appellant, who was present.

W. T. Lawrance, for the Crown, was not called upon.

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The only points of legal interest in the case were the following. The Court ruled that it would not hear more than one counsel for the appellant either in appeals against conviction or in appeals against sentence.

W. T. Laurance applied to the Court to make an order that the appellant should pay the costs of the appeal and of the prosecution at the trial. Since the trial it had been discovered that the appellant had ample means, and therefore he asked the Court to order the appellant to pay the costs, though Bankes J. had made no order.

J. A. Hawke: The Court has no power to interfere with the sentence unless there is an appeal against sentence. To make an order for costs would be to increase the sentence.

The Lord Chief Justice: We cannot make an order against the appellant for costs, as he has not appealed against the sentence.

Appeal dismissed.

Solicitors for the Appellant—*Mann and Crimp,* for *Kitson, Hutchings and Easterbrook,* Torquay.

N. B.

[IN THE HOUSE OF LORDS.]

THE DIRECTOR OF PUBLIC PROSECUTIONS - - *Appellant*

and

WILLIAM HENRY BALL and EDITH LILIAN BALL - *Respondents.*

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Coram The Lord Chancellor, the Earl of Halsbury, Lord Ashbourne, Lord Alverstone, Lord Atkinson, Lord Gorell, Lord Shaw, Lord Mersey, and Lord Robson.

On an indictment for incest on certain dates, evidence of conduct at an earlier date tending to prove that the parties had gratified a mutual passion is admissible as relevant to the issues raised on the indictment, and to rebut the defence that the relations between the parties were innocent.

Makin *v.* The Attorney-General of New South Wales, (1894, A. C. 57) *followed.*

Decision of the Court of Criminal Appeal in **Ball** (5 *Crim. App. R.* 238; 1910) *reversed.*

Appeal from an Order of the Court of Criminal Appeal (*a*).

The ATTORNEY-GENERAL (*R. D. Muir, Rowlatt* and *Graham Campbell* with him), for the Director of Public Prosecutions: This is the first appeal to this House from the Court of Criminal Appeal; it comes under s. 1 (6) of the Criminal Appeal Act, 1907, on a certificate of the Attorney-General that the decision of that Court in this case involves a point of law of exceptional public importance, and that it is in the public interest that there should be further discussion on it. There are two views as to the jurisdiction of this House: one, that the object of conferring the jurisdiction upon this House was to enable the highest tribunal of the land to pronounce an opinion on the point of law which may not affect the conviction or acquittal of the particular person charged, and I will deal with that

(*a*) The appeal is reported 5 Crim. App. R. 238.
This report is a summary of a transcript of a shorthand report of the case, supplied by the courtesy of the Director of Public Prosecutions. The judgment delivered by the Lord Chancellor is printed in full.

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when I have finished my main argument. If the House thinks a conviction was wrongly quashed, then the question will arise as to what the consequence would be; there would be no difficulty in correcting and restoring the record. The particular conviction or acquittal is, perhaps, of little importance compared with that of this House determining once and for all the law on a point of exceptional importance. [He then stated some of the facts of the case.] The point on which the House has to decide is, stated quite shortly, this: on a charge of having committed incest on a particular day, can you give evidence that that person had committed incest with the same person with whom he is now charged in the particular indictment, of previous acts of incest? In other words, supposing that you give evidence that a man has had carnal knowledge of a woman—with knowledge that she is his sister, on a certain date, you give evidence of the circumstance from which you ask the jury to infer, because you do not get the evidence of persons who are present, you can only get in these cases, as in the Divorce Court, circumstantial evidence—the question is, having given the circumstantial evidence with reference to the particular date, the subject of the charge, whether you can give evidence also that before this date this person had a guilty passion for this same woman, and that he gratified his guilty desire, and that there had been sexual intercourse between them. That is the point which has given rise to some diversity of judicial opinion. If the Court of Criminal Appeal is right in this case, I have no hesitation in saying that you might almost as well not have passed the Punishment of Incest Act. If that Court is right in saying that in the circumstances all you can do is to look to the particular act at the time, and that you must give evidence of that, and that you cannot give evidence of the guilty desire which had been existing, and then of opportunity of gratifying the guilty desire, the result would be that in those cases, I do not say it is absolutely impossible, but for practical purposes it is impossible to prove that there has been this incestuous intercourse, just as it would be in the Divorce Court if you had to prove by ocular proof that the act had taken place.

[The Attorney-General then dealt with the evidence outside "the controversial area." It included a letter written by the male appellant on September 13th, 1909, in which he alluded

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to the female appellant as his "wife." It was duly proved that she was his sister.]

After that evidence, evidence was tendered of acts previous to the dates, the subject-matter of the indictment, and Scrutton J. heard the arguments, while the jury were sent out. That evidence was tendered in order to prove that there had been intercourse between this brother and sister for some considerable time before, that a child was born of that relationship, that she was registered by the female defendant, who gave the father's name as William Ball, and it was sought to have this evidence admitted on the ground that it was relevant to the issue and that it enabled the Court to judge of the relationship between these two parties, on the well-known principle that, when you have evidence which is capable of both an innocent and a guilty construction, you are entitled to give evidence to rebut the defence which would otherwise be set up of innocent construction, and are entitled to prove such facts as will shew that in this particular case on those facts the inference ought to be drawn that the act was a guilty and not an innocent one. The broad proposition I wish to argue is—where you have the relationship of brother and sister proved, the mere fact of proving that they live in a room together, or even occupy the same bed, may not be sufficient evidence for the jury; they may not draw the inference that in the circumstances there has been intercourse between them; but when you have superadded to this relationship that of a sexual passion existing between the two, I submit that that is conclusive upon the point of admissibility, as it is only by the admission of that evidence that you are enabled to arrive at what is the real relationship between these parties, and the jury are put in the proper position of drawing the right inference. As to the question of proving the woman's consent, you are entitled to shew that she has had intercourse with the same person on previous occasions. There is abundant authority for that.

[Lord Halsbury: It seems to me that where the thing being proved tends to prove the particular thing indicted, the burden is on the other side to shew that it should be excluded. The old rule used to be stated—and it is very clear—that if the evidence tendered is to shew that the accused is a bad man it is clearly irrelevant; if it shews the act for which he is indicted has been committed, it is obviously evidence. Take the case of a man

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indicted for murder: he is proved to have committed a burglary because one of the things he committed it with was the weapon with which the murder was committed—it is no objection that you prove another offence.]

For instance, if we tendered evidence to prove that William Ball had had intercourse with another sister, that would clearly not be evidence, and ought to be shut out; but when the question is whether, in particular circumstances, he has committed an offence with a particular person, I submit it is most relevant to prove guilty desire and gratification of passion with that person, in order to get rid of the defence that might be set up that the relations were those of brother and sister, and that no guilty sexual passion is to be assumed. I submit that antecedent letters of an illicit amatory character, shewing in the first place merely the existence of a passion, would have been evidence, and letters shewing that the passion had been gratified could not be excluded. The present point involves no new law; the mistake, it is humbly suggested, which the Appeal Court made was to conclude that the evidence in question was to prove that the particular man was a man of criminal disposition—*i.e.*, that he was a bad man. Of course, for that it would not be admissible. I rely on Lord Herschell's proposition in *Makin* v. *The Att.-Gen. of New South Wales,* (1894) A. C. 57, as covering this case, as the Court of Criminal Appeal did—the difference being that the Court took the first part of the proposition and I take the latter part. I submit that it is absolutely conclusive. I intend to refer also to *Watson,* 2 Starkie at 155 (1817); *Burdett,* 4 B. & Ald. at 123; 106 Eng. Rep. 883 (1820); *Duke of Norfolk* v. *Germaine,* 12 Howell's St. Trials, 944 (1692); *Hamerton* v. *Hamerton,* 3 Hag. Eccles. Rep. 1 (1829); *Weatherley* v. *Weatherley,* 18 Jurist, 882 (1854); *Boddy* v. *Boddy & Grover,* 30 L. J. P. & M. 23 (1860); *Bond,* (1906) 2 K. B. 389; C. C. R.; *Allen,* 4 Cr. Ap. R. 181 (1910); *Wales* v. *Wales and Cullen,* (1900) Probate, 63.

[The Attorney-General then cited the facts in *Makin's* case.] The proposition of Herschell C. on which I rely is: "On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment, were designed or accidental,

or to rebut a defence which would otherwise be open to the accused." In that case all the authorities were considered. I leave out of consideration here all questions bearing strictly on intent, not because they are irrelevant to the discussion, but because they are so well known. When Lord Herschell says, "whether the acts . . . were designed or accidental," I submit that he is only giving instances of the proposition stated in the last words, "or to rebut a defence which would otherwise be open to the accused." Lord Herschell, after going through many authorities says: "In these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners." The Appeal Court does not, I think, throw any doubt upon Lord Herschell's judgment, but it has wrongly applied the principle, because it has taken the first part of the principle and said that it governs the case. The first part is not in dispute; it would apply if the Crown had proposed to prove the male appellant guilty with another relative, but it is not sufficient to shut out evidence, if it proves the issue, to say that it proves the commission of another crime.

[The LORD CHANCELLOR: It comes to this: it is admissible, if it is relevant to the issue, and not merely proof of a bad character.]

Yes. [The Attorney-General then read the summing up of Scrutton J., and the judgment of the Court of Criminal Appeal.] It is submitted that the passage in that judgment relating to *mens rea* misunderstands the whole ground.

[The LORD CHANCELLOR: The evidence is tendered to shew that the act was committed, and not the *mens rea* with which it was committed—the probability of the act itself?]

Yes.

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[The LORD CHANCELLOR: I suppose it was tendered to shew that the proper inference from the sleeping together was a guilty inference by reason of the previous relationship of the parties, and, in another way, the affirmation of innocence was rebutted by the same evidence.]

Yes, that is an inference from all these facts, though it would not be in the case of a poor family herding together.

The authorities I have cited shew that evidence of familiarity and of opportunity may be given. In the law as administered in the Divorce Division—the law of evidence being the same in all our courts, and there being no distinction between what is evidence in a civil case and in a criminal case, except so far as it is regulated by statute or by the application of principles applicable to criminal law but not to civil law—this kind of evidence is admitted times without number; it is the way in which cases in that Court are proved.

[The Attorney-General, after quoting from *The Duke of Norfolk* v. *Germaine*, 12 Howell's St. Trials, at 945 and 946, the dictum of Holt, L.C.J., "these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose," was about to refer to reported cases in and the procedure of the Divorce Court, when he was stopped by the House.]

Holman Gregory, K.C., and *Forrest Fulton* (with them *Eustace Fulton*) for the respondents. The date in the indictment is material.

[LORD HALSBURY: I do not assent to that proposition.]

I submit that direct evidence must be given of the commission of a crime. There are different kinds of crime: with regard to some, the proving of the "objective" or physical act proves the crime, but there is another class where you must prove the crime in two stages—first the act, then the mind of the person who commits the act, *e.g.*, in arson, abortion, murder, false pretences or fraud; in arson the "setting fire" must be with intent, in murder the killing with malice aforethought, the false pretence with intent to defraud, and

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so on. Only when there is a question of ascertaining the mind of the party can you call the kind of evidence the Attorney-General contends for.

[LORD ATKINSON: But the evidence admitted in *Makin's* case was admitted to prove the act, to prove they killed the child?]

I submit that it was admitted to prove malice. [The learned counsel then dealt fully with *Makin's* case.] When Lord Herschell says, "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried," if you substitute "position" for "criminal conduct," I submit that those words apply exactly to what happened here. I further submit that throughout his judgment Lord Herschell meant that where there is a question of what is in the mind of the party, you might call evidence such as is suggested here; he took it for granted that the act, the killing of the child, was proved, and he had in his mind that the evidence about the finding of other children which were adopted in similar circumstances was to prove the malice aforethought of the persons who took the child.

The subject was exhaustively dealt with in the case of *Bond,* (1906) 2 K. B. 389. [Counsel read a great part of the judgment of Kennedy J. and passages from that of Bray J.] Evidence of a passion between the defendants two years ago is not enough; it only goes to shew that the parties are likely to gratify it now. You must establish the act. You do not, no doubt, need an eye-witness; circumstantial evidence will do, *e.g.*, an amatory and lascivious letter written at or about the date of the crime charged (but not, say, a month before). You might have brother and sister with a strong passion for one another sleeping together, and yet no carnal knowledge. The carnal knowledge ought to be proved. Circumstantial evidence cannot be clinched by calling the disputed evidence. I have searched carefully, but have found no *criminal* case in which this kind of evidence has been admitted, other than the

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debatable case of *Makin*, except to prove what was in the mind of the party.

[Lord Mersey: In this case what had to be proved was the act of connexion; passion is necessary to that act, and does not this evidence prove the existence of passion, a necessary part of the act?]

Yes, but my submission is proving passion does not prove that that act takes place daily, or anything of that kind, and you are charging an offence on a particular date here. No inference can be drawn as to that particular date or period except upon evidence of what took place on that date or in that period. The evidence must be of what happened at that time.

[The Lord Chancellor: It comes to this—you say there might have been a conviction without this disputed evidence, that this evidence should not have been admitted at all because such evidence can only be admitted to prove *mens rea*, when *mens rea* is necessary to the conviction, and is not necessary for the purpose of proving that the act in fact had been committed.

Lord Atkinson: Assume that you had ample evidence of passion and of opportunity for the first time, would not the conclusion be almost irresistible? Or suppose a letter proving passion and the first opportunity of gratification?]

If the evidence of caresses or of the letter was on or about the date in question, yes.

[Lord Atkinson: Then your objection is to the weight and not the admissibility of the evidence, because passion had cooled, and indulgence was improbable.]

I submit that what they did before cannot be evidence—it cannot even be used to shew a guilty passion. I submit that all the judges in *Bond*, reviewing all the cases on the subject, came to the conclusion that evidence of this kind can be used, but only when you have to ascertain the *mens rea*. Kennedy J. in *Bond*

went through all the cases on this point. [Counsel then read part of Bray J.'s judgment in *Bond*.]

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[The LORD CHANCELLOR: The statute against incest is recent, and therefore no example of it could be found in the cases cited. Were there any cases of relations between a man and a woman?]

No, nor between men. I can find none whatever.

[The ATTORNEY-GENERAL: There is a bastardy case.]

That is for corroboration.

[The ATTORNEY-GENERAL: It is the same thing.]

Such cases, I submit, do not apply because there it is a question of calling evidence to corroborate the girl. The girl proves the act. The point in dispute is, if she is to be trusted, and you call evidence to corroborate her. In case this point is relied on, I cite *Chitson*, (1909) 2 K. B. 945; 2 Cr. App. R. 325.

Forrest Fulton followed on the same side. It was necessary to prove in this case that the man had carnal knowledge of the woman and that the woman consented. Carnal knowledge has been defined by s. 63 of 24 & 25 Vict. c. 100, the Offences Against the Person Act, 1861; it involves proof of penetration, as is clearly laid down in *Marsden*, (1891) 2 Q. B. 149; 60 L.J.M.C. 171; 17 Cox C. C. 297; C.C.R. The question for the jury was, did they in fact have carnal knowledge? The direct evidence here only made out a case of suspicion, and that these two persons had an opportunity of committing the offence —no more; that left the matter wholly open and ambiguous, and in view of the legal presumption in favour of innocence, the learned judge ought either to have withdrawn the case from the jury or to direct them not to convict on evidence of such a character. The indirect or "extraneous" evidence only proved that they had immoral tendencies towards one another—that they would be the sort of people who would be likely to commit the crime together. The prosecution's case was, that they being persons likely to commit the crime, you may infer in fact,

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without strict proof, that they did commit it. Substitute for this charge against these two persons one of larceny in exactly analogous circumstances. A watch is stolen in July, 1910; they had an opportunity of stealing it, but there is no direct evidence of their having done so. Could the prosecution put forward that in 1907 the man took a house in Walthamstow, that he was leading a dishonest life, that the woman came under his influence, that they resided together and committed acts of dishonesty, and that in 1908 (corresponding to the date of the child's birth) they were found in possession of stolen property, and were companions of thieves, &c.? That would clearly tend to shew that these two persons had dishonest tendencies, and acted together; their circumstances would have made it easy, if they wished, to steal the watch, *i.e.*, look at their antecedents and infer that they are likely people to have stolen the watch. I submit that if you cannot call evidence of previous acts of dishonesty to shew that dishonesty was committed, you cannot call evidence of previous acts shewing an immoral tendency to prove that an immoral act was committed. If such evidence is admissible at all, it is admissible in both instances, and I submit that these two cases cannot be distinguished, and the "extraneous" evidence is not relevant to the issue.

[Lord Gorell: Then, in the case of a suit by the man's wife in the Divorce Court for adultery—on the evidence here, you are driven to say that the judge would be bound to direct the jury that there was no evidence to find adultery. If so, you would practically shut out all the cases there.]

I am not prepared to say that the evidence in the Divorce Court is exactly of the same character as that in criminal Courts.

[Lord Halsbury: I was not aware that there is a difference in the law of evidence between criminal and other cases.]

Not in theory, but there is in practice.

[Lord Gorell: You require to draw the inference in the Divorce Court as much as you do under the Incest Act.]

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I submit that in the Divorce Court that inference ought not to be drawn.

Now, in *Oddy*, 2 Den. C. C. 264; 20 L. J. M. C. 1898 (1851), a case of receiving stolen goods, the head-note runs: "Upon a charge of feloniously receiving stolen goods, the possession of other stolen goods not connected with the immediate charge, is not admissible as evidence of guilty knowledge."

[Lord Halsbury: Whether that is law or not, I do not say. I have some impression it is not, but observe the words "not connected with the immediate charge," the particular act of stealing. That qualification goes through all the cases cited, and here the question is whether it is not relevant to the particular charge.]

I submit that what was done in 1908 is not connected with what is done in 1910. It is an antecedent act.

[The Lord Chancellor: Of course it is antecedent, and a different act in a sense, but it is one passion, and it is evidence of one passion, the proof of a passionate element when these people were together.]

There is no question here of motive or intent. The question is, was there a physical act or not?

[Lord Mersey: And that is an act which cannot be committed without passion.]

I do not know.

[The Lord Chancellor: At all events, passion is a common ingredient: can no evidence be admitted to shew there was passion?]

Proof of passion is not proof of the offence being committed. If the charge was that one man struck another with a poker, it would not be sufficient to shew that there was enmity between them: it would not shew that on a given date one struck the other.

[Lord Halsbury: Would it not be evidence to shew that there

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was ill-feeling? On an indictment for murder would it not be evidence that there was enmity?]

It might be admissible to shew malice. There you have to prove the murder, and here you have not proved the carnal knowledge. [The learned counsel then cited Lord Campbell's judgment in *Oddy*.]

Putting the argument shortly, it is open to the prosecution, not to give such evidence to shew whether a man did the act or not, but having proved that a certain act was committed, they may give such evidence to shew why it was committed. Here there is no question why the act was done, the question is whether or not it was done.

The ATTORNEY-GENERAL: Then, my Lords, on the other point on which a question arises as to the Act, and the effect of it, I should like to say a few words. If your Lordships will look at sub-s. 6 of s. 1 of the Criminal Appeal Act of 1907, the one question that is involved in this is whether the jurisdiction which is conferred upon your Lordships' House by this statute is more than a jurisdiction to determine what would be the proper direction by the judge, and what in effect is the law of the country. I submit that the House can restore the conviction. I do not want them to do more. I am dealing with this on the assumption that the House is in my favour, and comes to the conclusion the Court of Criminal Appeal is wrong. Then what is that jurisdiction? Is this House to pronounce an opinion on the law for guidance in future cases, or to deal with the particular case that has come before it, and in the event of it coming to the conclusion that the acquittal was wrong, should the House then direct the Court of Criminal Appeal to amend the record by restoring the conviction?

[LORD SHAW: It is not here by way of a case for an opinion: it is here by way of appeal.]

Yes, it cannot be academic; if your Lordships will look at the beginning of sub-s. 6, if it only said "If in any case the Director of Public Prosecutions applies to the Attorney-General, and the Attorney-General certifies," I could understand it being

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said that it was a matter of general guidance, in a matter of public interest, and that it was only to the Director of Public Prosecutions that the appeal is given; but it says: "If in any case the Director of Public Prosecutions or the prosecutor *or* defendant obtains the certificate." Suppose defendant is convicted, and the Court of Appeal says: You are rightly convicted, and then he applies to me, and I come to the conclusion that it involves a matter of exceptional public importance, and I certify, and it comes to your Lordships' House, it cannot be the law under this statute that although you might say this man was wrongly convicted, the decision is merely academic.

[The LORD CHANCELLOR: Why cannot we reverse the order?]

I do not know why not, my Lords. I am going to assume that your Lordships would, and that it comes to you by way of appeal in express words. Sect. 6 quite clearly says that the decision of the Court of Criminal Appeal shall not be final if the certificate is granted.

[LORD ASHBOURNE: It is all "subject thereto."]

Yes, and once the Court of Criminal Appeal has directed there should be a verdict and judgment of acquittal, which is what the Court of Criminal Appeal does when it comes to the conclusion that the conviction is wrong, no doubt the record is amended. But if this House comes to the conclusion that amendment ought never to have been made, it would clearly direct the Court of Criminal Appeal to re-amend the record.

[The LORD CHANCELLOR: The usual practice in this House, if an order is reversed, is that the case is sent down to the other Court with a direction to do this, that, or the other.]

Yes, and application is made to the Court of King's Bench.

[The LORD CHANCELLOR: And they carry out the effect of the order. That is in civil cases.]

Yes.

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[LORD ASHBOURNE: If the Criminal Appeal Act had given consequential directions there would have been no question; but it has not.]

Yes, they have not dealt with it; the section simply says the appeal shall not be final if the certificate is granted.

[The LORD CHANCELLOR: This seems to be a truncated or mutilated section; it does not provide for costs, but does it not provide really for this?—you begin with a conviction in the ordinary course of common law at the assizes, or the Old Bailey, which has not been affected by this statute at all. Then you give a statutory power of appeal to the Court of Criminal Appeal, which is a novel remedy; then it is said that is to be finally subjected to the appeal to the House of Lords. That is the substance of it; I do not quote the words, and you have the fact that both the prosecutor and the defendant may appeal; and if the defendant appeals, and is successful, it is not to be thought of that the conviction could stand, although there is no machinery. Are we not therefore to say, if the prosecutor, with the *fiat* of the Attorney-General, appeals, and we think the quashing of the conviction was wrong, that the original conviction must stand?]

I should have thought so. The position is this: when you have once got it that there is an appeal, you must suppose that sometimes the appeal will be successful; and if an appeal is successful, you must also assume there is power in this House to direct the Court of Criminal Appeal to act upon the order of your Lordships' House, and then the Court of Criminal Appeal has all the necessary power. I can shew by the section and the rules, and so on, that there is no difficulty whatever in the action of the Court of Criminal Appeal; any point of difficulty, if any, is in the direction from your Lordships' House to the Court of Criminal Appeal. I submit there is none when you realise that it is an appeal.

[The LORD CHANCELLOR: You know how odious it is to the mind of anybody trained in English law when an acquittal has been entered to interfere with it. I do not mean under this Act, but the old tradition is that there is an end of the case. The

machinery of the appeal to the House of Lords is in the same statute as the machinery for the appeal to the Court of Criminal Appeal, which is a remedy and relief, and it is a qualified relief.]

Yes.

[Lord Shaw: On the assumption that the House is favourable to your argument, would it be sufficient for your purpose that the judgment of the Court of Appeal be reversed, and this House remit the case to the Court of Criminal Appeal, to allow the remedy to be worked out?]

Yes. That would be quite sufficient; I entertain no doubt when that direction is given what the Court of Criminal Appeal would do, speaking with all submission in the presence of the Lord Chief Justice.

[The Lord Chancellor: What are we to say, according to your contention? Are we to say we reverse the order which is an order quashing the conviction?]

Yes, that is what your Lordships are to say.

[The Lord Chancellor: The ordinary question put in this House, as you well know, is "That the order appealed from be reversed." You say that that ought to be put here.]

Yes, my Lord.

[The Lord Chancellor: And then the Court of Criminal Appeal will be able to deal with it in accordance, as is usual, with the order. The Lord Chief Justice is kind enough to point out s. 1, sub-s. 7: "The Court of Criminal Appeal shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court."]

And there is something more than that, if I may add it, under

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s. 9. At the end of s. 9 the Court of Criminal Appeal is given all the powers of the Court of Appeal in civil matters.

[Lord Gorell referred to s. 4, sub-s. 2: "Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."]

No doubt this is subject to the special provisions of this Act, that is to say under sub-s. 6 of s. 1 it is not final, the Act says it is not; it can only be temporary if there is the certificate granted by the Attorney-General. The last words of s. 9 are: "The Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice . . . exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court."

[The Lord Chancellor: I suppose the Court of Criminal Appeal would then take in hand the machinery if we reversed the order and would quash the quashing.]

What would happen would be, following out the rules, working it out, the Court would then order that the verdict and judgment should be restored, which they have quashed, and then upon that the Court of trial would be ordered by the registrar under the rules to amend his record, that is to restore the verdict and judgment, and upon that a certificate of conviction can be obtained. If you have the certificate of conviction you can get a Bench warrant. No rules have been made with regard to the procedure in this House. It is s. 18 which gives power to make rules for the Court of Criminal Appeal.

[The Lord Chancellor: It says "Rules of Court" shall be made, but no rules have in fact been made as regards appeals to the House of Lords.]

No, but this, your Lordships know, is the first appeal, and the question has not arisen. I am content with this, and I see no difficulty if your Lordships come to the conclusion that this order should be reversed, if you make the order that this matter be re-

mitted to the Court of Criminal Appeal. I see no difficulty, but if there is I cannot help it. We shall have to deal with the Court of Criminal Appeal. That is all I ask you to say.

Holman Gregory: I have nothing to add to what the Attorney-General has stated.

The LORD CHANCELLOR: My Lords, in this case two persons, a brother and a sister, were indicted for incest in July, 1910, and September, 1910. Certain evidence, which was obviously admissible, was given to establish that, at all events, there was ample opportunity for this offence, and that there were circumstances, which, to say the least, were very suggestive of incest; also that these two persons lived together, and occupied the same bedroom and the same bed. Further evidence was then tendered to shew that these persons had previously carnally known each other, and had had a child in 1908. The object of that evidence was to make good that they had a guilty passion towards each other, and that, therefore, the proper inference from their occupying the same bedroom, and the same bed, was an inference of guilt, or, which is the same thing, in another way, that the defence of innocent living together as brother and sister ought to fail.

My Lords, the law on this subject is stated in the judgment of Lord Chancellor Herschell in *Makin's* case. It is well known, and I need not repeat it. The question is only of applying it. In accordance with the law laid down in that case and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed, not to prove a *mens rea*, as Mr. Justice Darling considered, but to establish the guilty relations between the parties, and the existence of a sexual passion between them as elements in proving that they had illicit connexion in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in the bed, of the fact that when there they had guilty relations with each other. I agree that the courts of law ought to be very careful to preserve the time-honoured law of England that you cannot convict a man of one crime by proving that he has

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committed some other crime. That, and all other safeguards of our criminal law, will be jealously guarded; but here I think the evidence went directly to prove the actual crime for which these parties were indicted.

The other noble and learned Lords concurred.

Order of the Court of Criminal Appeal reversed: Cause remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this Judgment.

Lords' Journals, December 15th, 1910.

Solicitor for the Appellants—*F. A. Stern.*

COURT OF CRIMINAL APPEAL.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE AVORY.

WILLIAM HENRY BALL AND EDITH LILIAN BALL.

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Graham-Campbell, for the Director of Public Prosecutions: The House of Lords, on December 15th last, reversed the order of this Court in this case, but as that tribunal has no machinery for the enforcement of its order, it becomes necessary to come back to this Court. The actual order of the House of Lords is contained in a letter from the Clerk of the Parliaments (produced) stating that the order of this Court of November 8th last had been reversed by the House. If the order of the Court of Criminal Appeal is set aside, the conviction will stand. I presume the Court will make an order dismissing the appeal. The defendants have both had notice of this application from the Director of Public Prosecutions, and the male defendant is here ready to surrender. The woman is, it is stated, ill and cannot attend.

The Court is a superior Court of Record, by s. 1 (7) of the Criminal Appeal Act. I take this to be like a King's Bench case when the Court is asked to enter judgment according to the decision of the House of Lords. I may refer to rule 35 (a). On the final determination of an appeal the registrar notifies the proper officer of the Court of trial of the decision of this Court, and the latter, no doubt, amends the record accordingly. Again, by s. 9 of the Act this Court may "issue any warrants necessary for enforcing the orders" of the Court. Moreover, by s. 1 (7) of

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the Act, the Court has "full power to determine . . . any questions necessary to be determined for the purpose of doing justice in the case before the Court."

[The male appellant then entered the dock.]

Forrest Fulton, for the appellants: I submit that the position of this Court is not that which my friend contends for. The section which gives power to appeal to the House of Lords expressly provides that the point of law must be one "of exceptional public importance" and that the appeal must be "desirable in the public interest." I submit that the making of an order under s. 4 (2) is quite distinct from the allowing or the dismissing the appeal. This is a statutory Court and can only act on its statutory powers.

[The Lord Chief Justice: But suppose the defendant appeals: he would remain in custody until he succeeded in the House of Lords, and then we must make an order to release him. If he failed he would remain in custody. What is the difference between such a case and this?]

If he succeeded the Court would allow the appeal. Here the Court has determined the appeal, and therefore it must, I submit, make an order entering an acquittal. In the case of an appeal failing the Court of Criminal Appeal would not have exercised its statutory power to make an order.

The Court has in reality exercised the functions of a jury, s. 4 (2). Therefore, the position of the defendants is really the same in all respects as if they had in fact been acquitted by a jury. There is a clear distinction in law between the position of the individual charged and that of the Crown: a convicted person can appeal, and the Court can hear any further evidence he may have to offer, and if that further evidence be of such a nature that it would be likely to have altered the decision of the jury had it been placed before them, it can acquit him. But no such power as this is given to the Crown; the Crown cannot re-open a matter after a verdict of acquittal, however much evidence were forthcoming. It is obviously the intention of the Legislature in s. 1 (6) that so far as the individual himself is concerned the Court of Criminal Appeal having entered a verdict of acquittal and made

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the order, the whole matter should be at an end. There is power to go to the House of Lords and get a general ruling for the direction of the Court in the future, but a final order having been made it ought not to be reviewed. "Subject thereto, the determination shall be final" means the determination and not the order made thereon. The order is made under s. 4 (2), which shews that it cannot be said that the decision of the Court of Criminal Appeal is only final subject to an appeal to the House of Lords. "Special provisions of this Act" there means such points as entering sentence and the different powers given by s. 5, which sets out more fully what is in sub-s. 2 of s. 4 stated in general terms.

There is, no doubt, s. 9 giving the Court all the powers of the civil Court of Appeal, but still the Court cannot order a new trial, and that section expressly has relation merely "to the proceedings of the Court."

The result here would be that the reversal of the order only means that a principle of law is laid down for the future.

[As to the appeal against sentence, the Court said that, if necessary, it would extend the time for appealing.]

The Lord Chief Justice: In our opinion there is no doubt as to the power and duty of this Court. The appeal from this Court to the House of Lords was successful, and the order of the House of Lords was that the order of the Court be reversed, with the natural consequence that the convictions are now re-established. In these circumstances, a procedure has been adopted, which seems to us to be the right procedure, of coming to this Court, which is a Court of record, to apply to have effect given to the order of the House of Lords by expunging from the records of this Court the previous order allowing the appeal of the two appellants and entering a verdict of acquittal. It was urged by Mr. Fulton that we have no power to make a further order in consequence of the reversal of our order by the House of Lords, because this appeal to the House of Lords was an appeal by the prosecution, and because we had already decided that the appeal should be allowed. It was said that our previous decision was in all respects the same as a verdict of acquittal by the jury, and that the matter could not be re-opened as against the individual

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defendants by the Crown; and, further, that the decision of the House of Lords was merely taken for the guidance of Courts in the future. If that argument were sound, the result of the *fiat* of the Attorney-General in the case of a guilty person would be to let that person go scot free. It is a very serious contention, and appears to us to be negatived by s. 1 (6) of the Criminal Appeal Act, 1907. No doubt a decision of the House of Lords may be a guide to the Courts, but, after all, it is only a decision in the particular case and the principle can only be applied in similar cases. By s. 6 (1) an appeal to the House of Lords may be brought by the prosecutor or the defendant or the Director of Public Prosecutions, if the *fiat* of the Attorney-General is obtained. A defendant could, therefore, in the event of his conviction being affirmed in this Court, ask for the decision of the House of Lords upon his conviction if he could satisfy the Attorney-General that his case was one of sufficient public importance; and if he succeeded in getting the House of Lords to make an order that the decision of this Court in dismissing his appeal was wrong, he would be clearly entitled to ask the Court for an order entering a verdict of acquittal and for his immediate release from detention.

The question as to the form of the order to be adopted in this case was discussed in the House of Lords, and it was considered that an application to this Court, which has full power to act in accordance with the order of the House of Lords, would be the proper course. The form of the consequential order to be made by this Court was considered; and if the last part of s. 9 of the Criminal Appeal Act be looked at it will be seen what the powers of this Court are in that respect. Sect. 1 (6) does not really throw any further light on the matter, but, as has been pointed out by Pickford J. in the course of the argument, the finality of the decision of this Court is subject to the provisions of the Criminal Appeal Act. In these circumstances it appears to us that by virtue of the decision of the House of Lords the conviction is restored, and, if necessary, an order will be made amending the record in accordance with the order of the House of Lords. The male appellant will remain in custody to undergo his sentence. As regards the female appellant, who we understand was too ill to attend this Court, a warrant will be issued for her arrest.

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Forrest Fulton: The male defendant had originally given notice of appeal against sentence as well as against conviction. I should like time to consider the question. In view of what has happened, the question of sentence was not gone into.

The Lord Chief Justice: You can raise the appeal against sentence at a future sitting of this Court. The case will be put in the list again, if necessary, early in the next sittings. The sentences would date from conviction, because there has been a further appeal, which is equivalent to leave.

Evidence was then given by a detective to the effect that the female defendant was at Maidstone, and that the male defendant had informed him that she was too ill to attend. Another officer swore that he had served notices from the Director of Public Prosecution of the present application on both appellants

The Lord Chief Justice: The right procedure has been adopted, but the notice is not an order. A warrant for her arrest must issue.

Appeal against conviction dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON AND MR. JUSTICE AVORY.

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William Henry Ball.

WILLIAM HENRY BALL.

Severity of sentence.

Forrest Fulton, for the appellant, who was present. This case is exceptional, because on December 8th last this Court set appellant free, and he might have left the country. No extradition proceedings, it is submitted, would have been possible. His remaining here ought to be considered favourably from the point of view of punishment. Again, the disproportion between the sentences on the two prisoners was too great, though the woman was eighteen years younger than the man. Further, it is submitted that in view of his previous excellent character, any term of penal servitude is excessive.

The LORD CHIEF JUSTICE: This Court has often declined to recognise any standard of punishment as between co-prisoners. As regards one appellant, the judge at the trial may be aware of facts which do not apply to the other. The question is whether the sentence passed is proper having regard to the evidence respecting the particular prisoner upon whom it has been passed and the circumstances affecting the offence. It is clear from s. 1 of the Punishment of Incest Act that the Legislature intended a severe sentence for the offence. Nor do the circumstances in this case admit of excuse; appellant was well off for his station, the connection was deliberate, not the result of sudden temptation, but maintained for two years, and a child was born. In the circumstances we cannot say that the sentence was too severe; it will run from the date of conviction.

Appeal dismissed.

Solicitor for the Appellant—*F. A. Stern.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE AVORY.

FREDERICK CHARLES ALBUTT AND FRED SCREEN.

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In s. 5 of 42 & 43 Vict. c. 11, the Bankers' Books Evidence Act, 1879, the meaning of "some person" is not limited to a partner or officer of the bank.

This was an appeal on grounds of law against conviction on November 9th, 1910, at the West Bromwich Quarter Sessions, for conspiracy to obtain money by false pretences. Albutt was sentenced to six months' imprisonment with hard labour, and Screen to eighteen months' imprisonment with hard labour.

G. Elliott, K.C. (with him *R. J. Lawrence*), for the appellants, who were not present.

[Other points of law than those reported here were taken. They are sufficiently noticed in the judgment.]

It is submitted that copies of certain banking accounts were wrongly admitted in evidence. Such copies were made by a chartered accountant in the employ of the prosecutor, and not, as is required by ss. 4 and 5 of 42 Vict. c. 11, the Bankers' Books Evidence Act, 1879, by an officer of the bank where the particular accounts were kept. My submission is that the Act contemplates only one exception, in s. 7, viz., in the special case of an order by a judge. I say that s. 7 supports my contention that a copy, under s. 4 or s. 5, must be made by an officer of the bank. It may be that s. 4 is for the protection of the bank people, but still it means some person connected with the bank. I submit "some person" in s. 5 means "some person from the bank." In any case the chartered accountant's evidence was uncorro-

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borated. A mere stranger cannot come to the Court and say, "I have made an extract." There should be some testimony by an officer from the bank. I have no authority for the proposition.

My final submission is that Serjeant Mollart's evidence was hearsay. He swore that he had been to investigate the address of Albutt as given in the invoices, and had made enquiries, and found no business carried on there, and that Albutt's father and mother occupied the front part of the house and a man named Volgth the back part. See *Saunders*, (1899) 1 Q.B. 490; 68 L.J.Q.B. 296; 80 L.T. 28; 63 J.P. 150; C.C.R.

I took no objection at the time; but there is no Act which compels me to do so.

[Avory J.: *Saunders's* case was different. The evidence objected to there was merely the evidence of a police constable that he had made enquiries.]

Vachell, K.C. (with him *Graham Milward*), for the prosecution, were not called upon.

Pickford J.: In this case appellants were convicted for conspiring to defraud, or obtain 126*l.* 0*s.* 6*d.* by false pretences, from one Walter Marsh. Screen was Marsh's confidential clerk. Screen was alleged to have conspired with Albutt to pretend that a certain quantity of scrap iron had been delivered, and to assure Mr. Marsh that the money for the iron had been paid, whereas in fact no scrap iron had been delivered at all. There was evidence that the money which had been obtained for the supposed delivery of the scrap iron found its way into Albutt's banking account, and then back again to Screen's account. The evidence was chiefly negative; that no trace of any delivery of the iron could be found anywhere in the documents relating to Mr. Marsh's business, or by anyone who had anything to do with his business. The jury came to the conclusion that this scrap iron had not been delivered at all, and that the whole transaction was a fraud; and they convicted the prisoners.

In the course of the trial what was called the Office Sidings Book was put in evidence. The evidence was that it was the duty of a witness Webb to keep this book as one of the books of the

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business. We are clearly of opinion that this book was an original book. Webb had to get the information for this book from some other source—chiefly, but not entirely, from the Sidings Book kept at the sidings themselves by one Bailey, who superintended the receipt of trucks there. The objection was taken that the Office Sidings Book could not be looked at until the absence of the book kept by Bailey was accounted for. It was also said that even if the evidence were allowed it did not prove the non-delivery of the scrap iron. We think the evidence was admissible, for these reasons: the prosecution were proving a negative, and in order to give evidence of part of the negative they called Webb. Webb's evidence was to the effect that looking at the book, which ought to contain information gathered from the source from which he would obtain it in the ordinary course, he could find no information of any delivery of scrap iron corresponding to the parcels alleged by the invoices to have been delivered. Some little confusion is caused by the convenient phrase "putting in"; the book was not really put in; the effect was simply this—looking at the book, he, Webb, could say there had been no delivery. Nay, more, it is apparent from the summing up that that was the only way in which the learned Recorder dealt with it. He dealt with the Office Sidings Book as simply evidence that Webb, whose duty it was to keep it, made no entry because he had received no information about the alleged delivery.

Then it was said that the copy of Screen's banking account was wrongly admitted, because the copy was not made by an officer of the bank, but by one Tyndall, a chartered accountant. The point turns on the Bankers' Books Evidence Act of 1879, s. 4. It is not necessary to read the whole section; suffice it to say that the proof that the book was one of the bank books, and kept in the ordinary course of business, must be given by a partner or an officer of the bank. But the Act does not say that the correctness of a copy of an entry must be proved by an officer; it does not say by whom in particular except that it must be by "some person who has examined the copy with the original entry" (s. 5). It was argued that s. 7, making an exception, supported the general rule that the copy must be made by an officer of the bank. Sect. 4 seems to have been inserted merely for the protection of bankers who do not wish other people to

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have access to their books. It amounts practically to this: that the bank can say, "We will make the copy ourselves." But under s. 7 a person may go to a court and ask if he personally may go to a bank and take a copy, and that carries with it this result, that in every case where an order is made, a copy may be taken by or on behalf of that person.

Then exception was taken to the evidence given by Police-Sergeant Mollart on the ground that it was hearsay evidence. The gist and important part of the evidence was this: that he went to the address of Albutt as described on the invoices, and found there was no business carried on there at all. It is true he went on to say that he made inquiries, and that he ascertained that some other person lived in the "back house," while the "front house" was occupied by Albutt's father and mother, and that there were no signs there of any metal business. We do not say whether the evidence was strictly admissible or not. But in any event this case clearly comes within the proviso to s. 4 of the Criminal Appeal Act.

It was also said that the evidence in the case did not establish the offence, and that there was an entire absence of any admissible documentary evidence. But there was no trace of the iron having ever been delivered by Albutt, and although it may be true that the evidence in the case was not absolutely or mathematically exhaustive, it was for the jury to say whether it was sufficient. If there were any matters that called for an explanation, the appellants might well have been called to furnish an explanation. There certainly was evidence for the jury to come to the conclusion that the iron had never been delivered.

Appeal dismissed.

Solicitor for Appellants—*J. H. Shepherd*, Dudley Port.

A. R.

WONG CHEY, WONG SING, YONG SING, AH YONG, FON YONG, AH FOOK, AND AH SHACK.

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Wong Chey, Wong Sing, Yong Sing, Ah Yong, Fon Yong, Ah Fook and Ah Shack.

Sentence reduced though appellant, defended at the trial, did not give evidence.

These were appeals against conviction on a point of law, and applications for leave to appeal on the facts, and against sentence. Appellants were convicted on November 16th before Mr. Justice Horridge at the Glamorgan Assizes of riot on August 5th, and sentenced to six months' imprisonment with hard labour.

Wilfrid Lewis, for all the appellants except Ah Shack (under s. 10 of the Criminal Appeal Act), who were not present, contended on the facts that the elements constituting riot were absent here, according to the judgment of Phillimore J. in *Field* v. *Receiver for the Metropolitan Police District*, (1907) 2 K. B. 853; 76 L. J. K. B. 1015; 71 J. P. 494; 5 L. G. R. 1121; 23 T. L. R. 736.

As to the sentence, it is submitted that the sentence was severe. They were foreigners, and doubtless not so orderly as Englishmen. There was no damage to property, however alarmed some people might have been.

T. H. Parr, for Ah Shack (under s. 10 of the Criminal Appeal Act), who was not present.

Ah Shack's case stands on a different footing from that of the other appellants. The police testified that at their request he had called on his countrymen to desist, and he had undoubtedly repeated the warning to them. The evidence of the identification of Ah Shack as the particular Chinaman who had committed an assault was unsatisfactory.

As to the summing up, it is submitted that the learned judge ought to have dealt in detail with Ah Shack's case, and not treated all the appellants on a general footing. There is a total omission of any reference to the warning given by Ah Shack, which was spoken to by Inspector Davies. This question of a warning is relevant on the question of Ah Shack being a participant in the common purpose. It is unfortunate in his interest that it was not referred to. He was not separately represented at the trial.

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Eustace Fulton, for the Crown, was only called upon as to Shack's case.

To whose aid were these Chinamen all coming? When you find that they were coming to that of Ah Shack, and realise that it was against him that the summons for assault had been taken out by the prosecutors, little room for doubt is left as to what the common purpose was. When the jury found he was taking part in the general scuffle, there was clearly evidence from which they could draw the conclusion that he was a party to the common purpose. There was abundant evidence of assault, and the question was properly left to the jury. Moreover, Ah Shack was not called.

[Avory J.: The common purpose was to assault Ah Saw and Tong Lee. Ah Shack had already taken out his summons, having gone to the Court on a perfectly legal matter. Why then should he join in the assault on Ah Saw and Tong Lee? Everybody, no doubt, was hitting everybody else in the general *mêlée*, but that is hardly evidence of any common purpose.]

Parr, in reply: Ah Shack did not give evidence because he did not understand English.

The Lord Chief Justice: In this case, as regards all the appellants except Ah Shack, we have no doubt. It is unnecessary to do more than say that the definition of riot as given by the learned judge to the jury was correct. As to the elements of the offence, we adopt the judgment of Phillimore J. in *Field* v. *The Receiver for the Metropolitan Police District*.

The submissions on behalf of the appellants in this case were that there was no evidence of a common purpose, and no evidence of an intent to resist by force anyone who should attempt to stop them in their purpose.

Now, apart from Ah Shack's case, there is no doubt that there was evidence of a common purpose. The facts were that there had been a previous disturbance among the Chinamen, the upshot of which was that Ah Shack had obtained a summons against the two prosecutors, Ah Saw and Tong Lee, for wilful damage to property, and Ah Saw and Tong Lee obtained a cross summons for assault against Ah Shack. When the summonses were applied

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for a number of Chinamen were found in the neighbourhood of the Court, and it certainly looks as if they had come to see what was the result of the applications. At an early stage, according to Inspector Davies, matters looked to be approaching a disturbance. Thereupon the police constable told Ah Shack to tell his countrymen not to create a disturbance; and it does certainly seem that at that stage Ah Shack did say something to the other Chinamen in order to persuade them to desist. The whole body then moved a short distance down the road to a place called the "Canal Bridge," and then five or six of them attacked the two prosecutors.

There is evidence that the only men who were assaulted by the others were Ah Saw and Tong Lee. The matter intended to resist and no doubt did resist.

In our opinion the evidence shews that this body of Chinamen had the common intention of assaulting the two men opposed to Ah Shack, and that they were willing to support the lodging-house keeper. They resisted the police, and there was evidence that they had assembled with the unlawful purpose of interfering with the two men who had obtained a summons. It was not disputed that a considerable number of people were greatly alarmed by this disturbance.

As regards the six appellants other than Ah Shack, there was clear evidence of the essential elements of riot.

The case of Ah Shack was different. If the only question to be considered was the question of riot we should have had some doubt as to whether or not the distinction between his case and that of the other appellants was sufficiently pointed out. The case now made out for him is that at an earlier stage of the disturbance he was not taking part, but was dissuading the others. That is the evidence of Davies. It seems improbable that he was engaged in the common purpose, because he had obtained his summons and acted as if he had some sort of control over the others. If the question had been whether there was sufficient evidence of his being concerned in the common purpose, we are not sure whether further investigation might not be necessary. But in our opinion his case comes within s. 5 (2) of the Criminal Appeal Act.

Ah Shack was not called. We have pointed out more than once that it is a very serious thing indeed that a man who has been

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defended by an experienced counsel should come here and ask us to quash his conviction, on the ground that he did not tell his own story. There were two counts for assault, and evidence was given by three witnesses that Ah Shack not only took part, but that he was one of the first to take part in the assault. There was, it is true, one witness who, at the time of the arrest, was in some doubt whether he might not have been mistaken as to the identity of Ah Shack as taking part in the assault. But, against this, there was the evidence of three witnesses who say they saw Ah Shack assault the two prosecutors.

The jury must, in our opinion, have been satisfied upon the evidence that Ah Shack did assault those two persons. Whether or not we should have come to the same conclusion, we do not say. There was evidence, and that evidence was properly left to the jury, that Ah Shack was guilty of assault

We can, therefore, in his case substitute a verdict of guilty on the count for assault. His sentence will be reduced to imprisonment for four months, to run from the date of conviction. In the case of the other appellants, the sentence will run from yesterday.

Verdict substituted as to one appellant, and sentence reduced accordingly.

A. R.

Bertie Tanner.

BERTIE TANNER.

Severity of sentence.

This was an appeal against sentence. Appellant was convicted at the Glamorgan Assizes on November 18th, 1910, before Horridge J. of demanding money under a forged instrument, and sentenced to three years' penal servitude.

Appellant, who was not present, was unrepresented.

Llewelyn Williams, for the Crown. I am instructed not to press the sentence, but to give the Court all the information I can. There were three occasions on which he demanded money, viz., 3rd September, 2*l*., and then on ensuing days 1*l*. 14*s*. and

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6*l*. There were supposed to be still other cases, but for these he was not indicted. The judge had only these three occasions before him. Appellant is an army pensioner in receipt of 6*s*. a week, and if the sentence remains or a sentence of hard labour is passed he will lose his pension.

May I venture to say that in no case of this kind in which I have appeared has a sentence of hard labour ever been passed? There was no evidence of any conspiracy between this man and any post office officials. Appellant was a postman, and his offence was the usual one of altering the time on his letter in order to make it appear to have been sent before the result of the particular competition for which he had entered.

The Lord Chief Justice: We think that the sentence of three years' penal servitude was too severe. The offence is not a post office offence in the ordinary sense. In some circumstances, of course, a more severe sentence has to be imposed for offences by postal officials. It is of great importance to maintain a high standard of conduct in an important public service. There was no previous conviction here. We have not overlooked the fact that a sentence of hard labour would result in the forfeiture of his pension. The sentence will therefore be reduced to one of one year's imprisonment.

Sentence reduced.

Solicitor for the Respondent—*The Solicitor to the Post Office.*

A. R.

WILLIAM JENNER.

William Jenner.

Severity of a sentence of hard labour.

This was an appeal against sentence, by leave of Lush J.

Appellant was convicted at the Middlesex Sessions on September 27th of the attempted larceny of telephone wire, and was sentenced to two years' imprisonment with hard labour.

Appellant, who was present, was not represented. One ground

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of appeal was that he was not allowed at the trial to call Bartlett, a co-prisoner jointly indicted with him. The latter declined to give evidence for himself, but made a statement, not on oath, on his own behalf. He then declined to go into the witness-box for appellant unless he was compelled. The Chairman ruled that, in the circumstances, he was neither a compellable nor a competent witness. The Court held that the evidence was properly rejected.

C. E. Jones, for the Crown, was not called upon.

PICKFORD J.: The sentence was two years' imprisonment with hard labour, but it is worth while to point out that a sentence of hard labour is not now so severe as formerly was the case. A prisoner is able to earn a remission of one-sixth of the sentence by good conduct, and the really severe period of the hard labour is quite short. I think it right to say this in view of the remarks which are so often made as to the severity of a long sentence of imprisonment with hard labour. Such remarks might have been justified once, under the Hard Labour Act of 1822, but the case is different now.

Appeal dismissed.

A. R.

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ELIZABETH SMITH MACKENZIE AND GEORGE HIGGINSON.

Under s. 2 (1) *of* 48 & 49 *Vict. c.* 69, *the Criminal Law Amendment Act*, 1885, *the man who has the carnal connexion (though he cannot himself be convicted under the sub-section), may be convicted of aiding and abetting, and of conspiring with the procurer.*

The offence of procuring is continuous, and therefore if the actual carnal knowledge takes place in this country there is jurisdiction in this country to try an indictment therefor, though the offence was commenced in another country.

Mackenzie was convicted, on November 19th, before Darling J. at the Central Criminal Court, of conspiracy and procuration, and sentenced to twelve months' imprisonment. Higginson was convicted at the same time of aiding and abetting Mackenzie and conspiring with her to procure, under s. 2 (1) of 48 & 49 Vict.

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c. 69, the Criminal Law Amendment Act, 1885, of common law conspiracy and of indecent assault, and sentenced to two years' imprisonment. The appeals, on grounds of law, against conviction were on the certificate of Darling J. Higginson also applied for leave to appeal against sentence.

A. S. Carr for the appellants (under s. 10 of the Criminal Appeal Act), who were present.

Appellants were convicted on an indictment, containing nine counts, charging them with various offences under the Criminal Law Amendment Act committed on Virginia Buchanan. There were three other counts, charging offences upon a girl named Thompson, but these counts were not allowed to go to the jury.

The facts of the story as proved by the prosecution were briefly these: In August, Mackenzie was in Scotland and issued advertisements for servants. Virginia Buchanan and her sister applied in answer, and the former was engaged. The arrangements for the elder sister came to nothing. On September 7th, Mackenzie and Virginia Buchanan came by sea to London. As soon as she arrived at the house of the prisoners, 10, Grange Road, Highbury, Buchanan was taken to Piccadilly and women of bad character were pointed out to her. A blue and a mole-coloured costume of an extremely scanty character were made for her and she was shewn a number of filthy and indecent books, out of one of which Mackenzie read extracts. On September 14th, Higginson arrived at Highbury. The girl Buchanan was obliged to wait upon him and to bath and dress him in some curious silk garments, which were produced in court. These garments he habitually wore about the house. She was obliged to be in his study from 2 to 4 a.m. to help him with his work. On September 19th he was alleged to have indecently assaulted her. The girl related that between September 19th and 23rd she broke a clock and was punished by Higginson smacking her with his bare hand. Then later came acts of connexion. On September 23rd the girl was strapped up, and, while the act took place, Mackenzie played the piano. There were other acts of connexion on September 29th and October 5th. On October 9th the girl disappeared. She was a Roman Catholic, and was encouraged to attend service at a church in Islington. Indeed, she was given every opportunity of making a statement to the priest there had she

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been so minded. On her first Sunday he had told her if she was in any difficulty owing to the notorious snares besetting girls in London to come to him. There was, however, no complaint by her up to October 9th. She was in the habit of writing home, and from the tone of her letters to her mother she seemed quite happy.

The only other evidence in the case was that of her mother, that of Lily Lloyd, a fellow-servant, the medical evidence, and that of the police, who found on the premises articles of a most disgusting character.

Counts seven, eight and nine were framed on s. 2 (1) of the Criminal Law Amendment Act. Mackenzie was charged with procuring, and Higginson with aiding and abetting Mackenzie on various dates: September 23rd, 29th, and October 5th.

The first objection turns on the real meaning of "procure." It may have one of two meanings. The meaning I put upon it is to take out of proper custody for the purpose of being carnally known. The meaning put upon it by the prosecution is to induce the girl or woman to submit to being carnally known by some man. Mackenzie issued the advertisement in Scotland and was therefore outside the jurisdiction, as I submit the offence was completed by Mackenzie as soon as she embarked with the girl. Higginson is not capable of being convicted as a principal offender under s. 2 (1), and if he is incapable of being convicted as a principal, then he cannot be an accessory, for there are no accessories in misdemeanour.

Counts one and two charged the defendants with conspiring to commit the same statutory offence. My submission is that if—as is admitted by the prosecution and Darling J.—Higginson cannot be convicted of the offence itself, he is also incapable of being convicted of conspiring to commit it. The next three counts were for common law conspiracy. There is no authority to support a conviction on these three counts. Apart from the statute the acts committed would not have been an offence if committed by one person, and therefore are no offence at all if done by more than one person acting in concert.

I submit, further, that there was misdirection on the count for assault. As to the jurisdiction, s. 2 (1) runs: "Any person who procures or attempts to procure any girl . . . to have unlawful carnal connection, *either within or without* the Queen's Dominions, with any other person . . ." The words "within or with-

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out" qualify the words "have unlawful connection" and not the procuring. By "procures" I understand, takes out of proper custody, *i.e.* from her lawful abode. The procuring must be done in this country, although the connexion may take place anywhere, or, even, as I submit, not at all. If, however, the construction contended for by the prosecution is right, a very large number of cases would not be touched by the section, *e.g.* where a person invites a girl to serve abroad with the full intention that when she gets abroad she should be carnally known by some person abroad. The offence consists in inducing her to go under a pretext of an innocent purpose. That is the mischief aimed at. Such a hypothetical case as I have put can only be hit by the interpretation I am seeking to put upon the section. I say that the offence is complete when the girl leaves the country. In the view of the prosecution, there would be no offence at all until the girl submits and the act actually takes place. If "procures" meant, as the prosecution contends, "induces to submit to being carnally known, &c." the section would, on the other hand, extend to a number of cases which are never prosecuted, *e.g.* where servant girls enter houses, the motives of the master being quite innocent when the girl is engaged, though she is defiled subsequently. It was put against me in the Court below that sub-s. 4 provides for the very meaning I am putting in sub-s. 1. But the distinctions between sub-s. 1 and sub-s. 4 are clearly these: that in sub-s. (1) the girl must be under twenty-one, and must not be a common prostitute or of known immoral character.

In this case, it was only in order that she might have carnal knowledge with himself that Higginson was charged with procuring this girl. He could not be charged as a principal offender because it was with himself that the act took place. In *C— —*, 74 J.P. 208 (1910), it was held that a man cannot be convicted of procuring for his own purposes. That would amount merely to seduction. It cannot make the matter any better to charge him with aiding and abetting someone else. He was in reality the chief offender—though not for the purposes of the Act.

I rely upon the Accessories Act, 1861, which says that an aider and abettor in misdemeanours may be indicted as a principal—which is merely declaratory of the common law. There were several cases before the Act was passed. *Burton*, 13 Cox C.C. 71;

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32 L. T. 539 (1875); C. C. R.; *Mears*, T. & M. 414; 2 Den. C. C. 79; 20 L. J. M. C. 59; 15 Jur. 66; 4 Cox C. C. 425 (1851); C. C. R.; and see *Du Cros* v. *Lambourne*, (1907) 1 K. B. 40; 21 Cox C. C. 311; 23 T. L. R. 3. My submission is that as Higginson is legally incapable of being convicted as a principal, therefore he is also incapable of being an aider and abettor.

[Counsel then contended that the articles found in the house were not corroboration of the prosecution's story. The point is adverted to in the judgment.]

Further, my submission as to counts one and two (conspiring to commit the statutory crime) is that if Higginson is incapable of being convicted under s. 2 (1) as a principal he is also incapable of conspiring to procure. *Whitchurch*, 24 Q. B. D. 420; 59 L. J. M. C. 77; 16 Cox C. C. 743; 62 L. T. 124; 54 J. P. 472 (1890); C. C. R. is distinguishable because the decision proceeded on the assumption of a mistake of fact in the woman who conspired to procure abortion upon herself; *i.e.*, if it had not been for her mistake in believing herself to be with child, no one of the prisoners in that case would have been convicted.

[Pickford J.: The judgments do not proceed upon that ground. The judgment of Lord Coleridge C.J. proceeds upon a broad principle: there is nothing about any mistake of fact in that judgment or in the others.]

In *Whitchurch's* case there was no legal impossibility in the woman committing the offence. The impossibility arose because of a mistake of fact. In the present case, it was legally impossible for Higginson to procure under the section.

[Avory J.: He is not charged with committing the offence: the woman is. The question is whether he cannot aid and abet her in an offence which undoubtedly she can commit.]

Undoubtedly he cannot commit it; in my submission, it follows that he cannot conspire to commit it.

[Pickford J.: Before you pass to other cases, look at the judgment of Hawkins J. in *Whitchurch*. Apply the principle in it to this case. Is it not on all fours?]

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I submit not for the reasons I have stated. I cannot take it further. Immunity of one party from consequences was held to have no bearing on the question of conspiracy between that party and another. *Duguid*, 70 J. P. 294; 94 L. T. 887; 21 Cox C. C. 200; 22 T. L. R. 506; 75 L. J. K. B. 470; (1906) C. C. R. But that case does not establish that the person who has immunity from prosecution for the act which formed the object of the conspiracy could also be convicted for conspiracy. At all events, although a warrant was issued against Mrs. Chetwynd in that case, the question whether she could be convicted was left entirely open, as was clear from the sequel. *Crossman* v. *Leyland*, *Ex parte Chetwynd*, 24 T. L. R. 517 (1908).

[AVORY J.: It was not necessary to the decision to decide the point at all.]

I say that in no one of the cases cited was the position the same as here, for in none was the alleged conspirator legally incapable of committing the offence.

[The LORD CHIEF JUSTICE: Procuring for another person is the offence here, and not seduction.]

Procuring for oneself in such a way as Higginson has done here may have been thought by the Legislature to have been an offence, but it does not say so. Higginson is another person from Mackenzie. This is an offence in Mackenzie alone.

[AVORY J.: Surely it is an offence to conspire with someone else to procure when that other person can procure. A person who is not a bankrupt may aid a bankrupt to obtain credit contrary to the provisions of the Debtors Act, 1869.]

As to the counts for common law conspiracy, my submission is there was no evidence of the conspiracy. Proof of the connexion is not evidence of the conspiracy. *Boulton*, 12 Cox C. C. 87 (1871). I say Higginson's only act was having connexion, which is not an offence. My submission is that there is no evidence of conspiracy as such at all. Higginson's name was never mentioned at all, and there is no shadow of evidence that he

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conspired that Mackenzie should go and get hold of a girl in Scotland. He did not know what Mackenzie was going to do. The only evidence against him is that when he got to Highbury and found the girl there he took advantage of her. The conspiracy, if there was one, began long before September 14th.

These counts for common law conspiracy can be supported either on the supposition that the offence, if committed by one person, would be an offence, or, that it only becomes one if there be a conspiracy. *The general rule*, however, is that there can be no conspiracy except to commit acts which *per se* are offences, and the only exceptions are conspiracy to defraud and pervert the course of justice, and offences against the Government. See *Wright* on *Criminal Conspiracies*, p. 62.

[The Court thought that it might be unnecessary to deal with these counts. Counsel accordingly proceeded to deal with the improper reception of evidence as to certain articles found in the house.]

The evidence and cross-examination in question were not admissible on the ground that the defence took the line of casting imputations on the witnesses for the prosecution. The cross-examination of the girl Buchanan to shew she had been addicted to certain practices was relevant to the issue. The prosecution were therefore not entitled to put these articles in as evidence, for they merely tended to shew the grossly immoral character of the appellants.

[Avory J.: They were put in, not to attack the credit of the witness, but as evidence relevant to the issue. They were corroboration. If your cross-examination of the girl was not an imputation upon her, then the cross-examination of Higginson by counsel for the Crown was not either. You are in that dilemma.]

My cross-examination was relevant; his was not. The case I endeavoured to make was that Mackenzie, who had for some time lived with Higginson as his mistress, and relied upon the affections of Higginson, would be very unlikely to do all that the prosecution alleged she had done, against her own interests.

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But this was not the case put to the jury by the learned judge. There were three views to take—either the whole story of the girl Buchanan was true, or it was a pure invention, or, thirdly, it was true that Higginson did have connexion, but that Mackenzie did not assist in bringing that about. Appellants were entitled, I submit, to have that last view brought before the jury; and not to have the case narrowed down to the bare alternative of whether the whole story was true or a fabrication.

I desire only to add that the charge of rape was not proceeded with in view of the repeated opportunities the girl had of preferring a complaint.

Bodkin (with him *Montague Shearman, junr.*), for the Crown, was not called upon.

The Lord Chief Justice: This is one of the most distressing cases that have been before the Court. The way in which it has been conducted by Mr. Carr deserves great praise.

The appellants were charged on an indictment of nine counts so far as is material to this appeal. The first two charged a conspiracy to procure, the last three charged Higginson with aiding and abetting Mackenzie in committing an offence under the Criminal Law Amendment Act, 1885. Counts three, four and five charged appellants with a common law conspiracy to procure the defilement of a girl, and the sixth count charges an indecent assault.

Under s. 2 (1) of the Criminal Law Amendment Act the offence is procuring a girl or woman under twenty-one, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, *with any other person;* the offence is not procuring for the purpose of seduction by the person who procures, but the section contemplates a procuring in order that some person other than the person procuring may have unlawful carnal connexion with the girl or woman. Mr. Carr, therefore, urged that as there had been carnal knowledge by the appellant Higginson, as he could not commit the offence of procuring within the meaning of the sub-section, he could not aid or abet or conspire with the appellant Mackenzie in procuring the girl for him, Higginson, to have unlawful carnal knowledge of her. In our judgment there is no substance in that objection, and the point

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is covered by three decisions which were cited by Mr. Carr. The case of *R.* v. *Whitchurch* exactly covers the point. It is not open to serious argument that if Mackenzie procured the girl Buchanan in order that Buchanan might have unlawful carnal connexion with any other person, that Mackenzie was not guilty of an offence. One sees no reason why, if she procured the girl with the aid and assistance or by unlawful agreement with the person who was to have carnal knowledge of the girl, she would not still be guilty of an offence. It is not a logical sequence to say that because there is the additional fact that the connexion was to take place with the person who conspired with her, Mackenzie's offence would be less. Although under the law as it now stands, for reasons which no doubt commended themselves to the Legislature at the time, there is no offence in procuring except when the girl or woman is within certain limits of age, the offence of procuring, under s. 2, is not destroyed merely because the other person might not be guilty of any offence had he procured the girl directly. There cannot be the slightest doubt that if three persons combine to procure, they are all guilty of the offence contemplated by s. 2, even though the connexion is with one of the persons so combining to procure. The point is covered by the last passage in Lord Coleridge's judgment in *Whitchurch's* case: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence." And Hawkins J. said: "What she did was a conspiracy to commit a criminal act."

In this case we are all satisfied that there was abundant evidence that the woman Mackenzie procured this girl within the meaning of sub-s. 1 of s. 2 of the Act of 1885, and that that was done by conspiring with and the aiding and abetting of the appellant Higginson.

Then it was said that everything in the nature of procuring was done by Mackenzie in Scotland—outside the jurisdiction. It seems to us that the full offence is not committed until the carnal knowledge is brought about, though the attempt may be completed. The words of the section are "*to have* unlawful carnal connexion." In our opinion the woman Mackenzie having

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commenced the offence in Scotland, there was a continuous offence of procuring a girl to have unlawful connexion with another person, Higginson, and consequently a part of the procuration takes place within the jurisdiction. Consequently, we have no doubt there is jurisdiction in this country; this principle has been acted upon in many cases where the question of venue might have arisen as between different countries and places of trial. The acts which shewed that the girl was procured for the immoral purpose took place in the jurisdiction where they were tried; therefore, there is no ground for the suggestion that she could not be tried here. We have no doubt that on the first, second, seventh eighth, and ninth counts there was jurisdiction to try here. Besides such a case as that of *Whitchurch*, there are other analogies, as was pointed out by Avory J., viz., illustrations under the Debtors Act. It never has been doubted that a person who is not a bankrupt can aid and abet a bankrupt in such offences as getting credit without disclosing his position. These cases are applications of the same rule as is here applied to Higginson.

Then objection was taken to so much of the conviction as related to the common law conspiracies. We have not heard Mr. Bodkin upon that point; but in our opinion it is not necessary to go into it. The first, second, and the last three counts are quite sufficient to support the conviction. All we say is that we do not express any opinion upon it. Without throwing any doubt on the proposition that to conspire to procure the defilement of a girl is an offence at common law, we do not say whether the common law counts are good. The question is one that continually requires to be dealt with on the facts of each particular case. We express no opinion either upon the counts themselves or the evidence given under them.

Then it was said that there was no corroboration. No one case of corroboration is authority for another unless the specific question arises whether any particular piece of evidence or act is corroborative or not. All we say is that there was abundant corroboration on many points of the prosecutrix's story.

Without expressing any opinion whether the evidence as to the articles found on the appellants' premises, which was attacked by Mr. Carr, was or was not admissible on the ground that the questions put to the girl Buchanan involved an attack

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on a witness for the prosecution, the evidence seems clearly admissible in proof of the offence alleged, viz., the debauching of this girl. Some of the things in question were for the purpose of destroying her moral character. It is in all respects the same as in coinage offences, where such an instrument as a mould or die found upon the premises may be put in in evidence. In this case it seems to us, having regard to the defence raised, that it was relevant to shew that this apparatus and the paraphernalia would be available for committing the offence, and to help these appellants to corrupt the mind of the girl.

Having regard to the terrible nature of the case, there is no ground for interfering with the sentence. The punishment was not by any means adequate to such a case as this, but that is a matter we cannot deal with, because it is for the Legislature, and not for us.

We order exhibits 4, 6 and 20 to be destroyed.

Appeal dismissed.

A. R.

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14 *December*
John Buggs.

JOHN BUGGS.

Severity of sentence on weak-minded prisoner.

This was an appeal against sentence, by leave of Lush J. Appellant was convicted at the County of London Sessions, on November 25th, 1910, of larceny, and sentenced to eighteen months' imprisonment with hard labour.

Appellant, who was present, was unrepresented.

A. Stone Hurst, for the Crown: I am instructed not to press the sentence. At the same time, I am to draw your Lordships' attention to the previous convictions and sentences.

The Lord Chief Justice: In this case, appellant was convicted for stealing a pair of boots from outside a shop, and sentenced to eighteen months' imprisonment with hard labour. The sentence is a very severe one. It is only fair to say, however, that the reason why it was passed was because there were some five previous convictions. In 1906 he was sentenced to twelve months

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imprisonment for housebreaking, and in 1907 to three years' penal servitude for a similar offence. Obviously this is a case in which the learned Chairman thought a severe sentence was necessary.

The man is weak-minded, and in his notice of appeal he asks to be put away in some criminal home. If there were such a place we should certainly consider the matter. But we should be doing him no real kindness to reduce the sentence. We know quite well that the conditions of imprisonment with hard labour are such that a man is well looked after. It would most likely do him no good to reduce the term passed upon him, and in all the circumstances we think the sentence ought to stand.

Appeal dismissed.

A. R.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE AVORY.

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Henry Heuser.

HENRY HEUSER.

Police officers who assent to an informer's entrapping an offender do not thereby become accomplices.

This was an appeal from the order of Lush J. refusing leave to appeal against conviction. There was also an appeal on a point of law which was placed in the Summary List. Appellant was convicted before Horridge J. on November 29th, 1910, at the Chester Assizes under s. 11 of the Criminal Law Amendment Act, 1885, of gross indecency with a male person, and sentenced to twelve months' imprisonment with hard labour.

Artemus Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

There were three witnesses for the prosecution, including a young man named Procter, upon whom the offence was alleged to have been committed, and two police officers. The defence was that appellant had been entrapped by the police into committing the offences. The learned judge, in my submission, was wrong in holding that corroborative evidence was not necessary. The police were practically parties to the commission of the offence by standing by.

The facts were that on a Monday night another offence had been committed, and Procter went to the police sergeant, who took down his statement in writing. He then met appellant on Wednesday when the offence was committed which formed the subject of the indictment. Procter would never have met appellant if the police had not told him "there was no harm in it."

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What happened on the Wednesday night was this: P.-C. Edmunds was told by the sergeant to meet him (the latter) at the police station at 7 p.m. This shews pre-arrangement. As a result of what was said to Procter by the police, Procter and appellant arranged to meet that night at 7.30. Appellant was taken into a public-house, where he had a drink, after which appellant and Procter went down a lane and stopped near a gate at a spot where police officers were hidden. Then certain things happened which were clearly a criminal offence, and the police officers did not raise a finger to stop their commission. Inasmuch as this went on for fully a quarter of an hour, it is submitted that the police were parties to the offence.

[AVORY J.: The mere fact of not preventing an offence does not make a person an accomplice.]

But here the police had done more than that. They had arranged to be there, and had planned the meeting, or rather the police sergeant planned the meeting, and communicated the plan to the other police officer. This, perhaps, did not amount to counselling the actual commission of the crime, but my submission is that as soon as a step is taken in a crime, the police are bound to interfere.

[AVORY J.: They merely waited until they saw something which was unmistakable. The learned judge did rule that Procter, who gave evidence, required corroboration.]

AVORY J.: In this case we think there is no ground for the contention that the police officers were accomplices, and therefore required corroboration. Appellant had the benefit at the trial of the ruling that the witness Procter did require corroboration. Speaking for myself, I am not satisfied at all that that was so. But even assuming it in the appellant's favour, there is no ground for saying that when the police have information that an offence is likely to be committed, and go to the place for the purpose of detecting it, they thereby become accomplices merely because they assent to the informer going there too, for the purpose of entrapping the offender.

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Therefore there can be no leave to appeal on the point of law, and as there is no suggestion that there is any ground for giving leave to appeal against the conviction on the facts, the appeal is dismissed.

Application dismissed.

A. R.

James Russell.

JAMES RUSSELL.

Proviso to s. 4 of the Criminal Appeal Act applied despite irregularity in procedure at the trial.

Appellant was convicted on November 15th, 1910, at the Warwick Assizes, before Bucknill J., of uttering counterfeit coin, and sentenced to five years' penal servitude and one day's imprisonment with hard labour.

This was an appeal against conviction and the sentence of penal servitude, by leave of the full Court, granted on December 12th (though the application was out of time), in order that a point of law might be argued.

M. Nickalls, for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Appellant was indicted, together with two other prisoners, Acton and Devereux, for three utterings of counterfeit coin on July 30th. This is a misdemeanour under s. 10 of 24 & 25 Vict. c. 99, the Coinage Offences Act, 1861. Then the appellant was tried singly on a second indictment for one of the *same* three utterings of counterfeit florins at Coventry on July 30th, after having been convicted of uttering counterfeit coins at Nottingham in February, 1909. This is a felony by s. 12 of 24 & 25 Vict. c. 99, the Coinage Act, 1861, because there is a second offence of uttering. Now s 37 of that Act says that where it is intended to proceed against a man for the felony, the *subsequent* offence is to be inquired into first. The mode of arraigning a defendant on an indictment for any offence committed after a previous conviction is, in the first instance, to arraign him upon so much only of the indictment as charges the subsequent offence. The whole of the second indictment was read out to the prisoner, who

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pleaded not guilty. Not quite the same evidence was given as in the previous trial, because he was being tried alone. Evidence was then at once called as to a previous conviction at Nottingham, in February, 1909, without waiting for the verdict of the jury on the subsequent offence. Bucknill J. called the charge "a composite charge," in summing up.

[*Ryland Adkins*, for the Crown: I was there. A verdict was taken on the first indictment, all three men being found guilty. Then a new jury was sworn to inquire as to the felony, which involved as a previous conviction the misdemeanour in the first indictment.]

Were it not for the proviso to s. 4 of the Criminal Appeal Act I should have no difficulty. Sentence of penal servitude could not have been passed on the first indictment, and, if so, the penal servitude cannot stand.

The evidence against appellant on the misdemeanour was a great deal stronger than on the felony, because of the presence of the other two prisoners.

The idea of the prosecution was that if the felony charge were taken first and failed, it would be hardly fair to go on afterwards on the misdemeanour charge. I fail to appreciate how what was done can be said to have been done out of fairness to appellant.

I submit that all I have to do here is to satisfy the Court that a man who had a fair chance of acquittal has been deprived of it.

I further submit that as an express provision in the Coinage Act has been disregarded, the proviso to s. 4 of the Criminal Appeal Act cannot prevail. The departure from the proper procedure was so great here that the injustice arising from it can only be got rid of by proving that the verdict of the jury would none the less have been the same.

Dyson, (1908) 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 1 Cr. App. R. 13, shews that the probabilities of a jury's finding on a proper direction does not justify the Court in substituting themselves for the jury

I am entitled to assume that the second jury approached the case with an impartial mind. Had they known nothing of the immediately preceding trial, they might not have convicted.

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Ryland Adkins, for the Crown: Appellant was tried on the misdemeanour charge first for the reason stated. Then, to prevent the same jury trying the felony charge, a fresh jury was empannelled. The evidence tendered on the trial for the felony was ample to convict him of the more recent uttering. The evidence was tendered, sworn to, and not cross-examined to by appellant, and, apart from the technical point now raised, I submit the second jury could not but have found that he was the man who was convicted at Nottingham in 1909.

The only point now raised is that we ought to have taken the verdict of the second jury on the misdemeanour before we took their verdict on the felony. That is true; but I submit the case comes within the proviso to s. 4 of the Criminal Appeal Act and that there was no miscarriage of justice.

[Avory J.: Suppose the moment you called upon the man to plead he had put in a plea of *autrefois convict*. What would have been your answer?]

I suggest it is hardly necessary to enter into that supposition. But apart from that he had been found guilty of what was an essential part of the second indictment, by virtue of s. 37 of the Coinage Act. The fact that he had been found guilty on the misdemeanour (charged on the first indictment), which was an essential part of the second indictment (for felony), left it to be decided by the jury merely whether appellant was the man who had been previously convicted at Nottingham. I put it that way, not to dispose of an irregularity which I fully admit, but to support my contention under the proviso to s. 4 of the Criminal Appeal Act.

Nickalls, in reply, cited *Thomas,* L.R. 2 C.C.R. 141; 44 L.J.M.C. 42; 31 L.T. 849; 23 W.R. 344; 13 Cox C.C. 52 (1875); and s. 9 of the Coinage Act, 1861.

The Lord Chief Justice: An irregularity was undoubtedly committed in this case, and we have to consider how far it is fatal to the proceedings following upon it, and, if not fatal, how it affects the sentences. The irregularity here committed was a

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contravention of the words in s. 37 of the Coinage Act which say that on an indictment for felony under that section the prisoner must in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and then afterwards the previous conviction may be inquired into. We can see how s. 37 escaped the attention of Mr. Adkins and the learned judge. There had been an indictment for a misdemeanour in respect of the very same uttering as that relied upon to support the count for felony in the second indictment. The appellant had been previously tried with two other men and found guilty. As Mr. Adkins says, the only real question on the second indictment was whether the appellant was the same man who had been previously convicted at Nottingham in the name of White. Such an irregularity as this might in some cases be very serious. That there was not a proper trial on the felony indictment in the strict sense is now plain; and this fact is further complicated because for the misdemeanour he was sentenced to one day's imprisonment with hard labour, and for the felony to five years' penal servitude. In our opinion the case comes within the proviso to s. 4 of the Criminal Appeal Act. We consider that there is no ground for thinking there was any miscarriage of justice in this case.

Now but for the fact that there was a previous trial there might have been a very serious question as to whether or not this verdict could possibly be supported. If appellant could have pleaded the previous conviction for the misdemeanour in bar of the felony indictment it would have created a difficulty. Mr. Adkins rather assented to that view, and it seems to us that *R.* v. *Thomas* indirectly, perhaps directly, decides that appellant could not plead *autrefois convict* to the felony indictment by pleading that he had just been convicted for the misdemeanour.

It seems to us that the previous trial affords substantial ground for suggesting that there was no miscarriage of justice. In all probability, as appellant was anxious to raise the question of identity, he would, if he had been arraigned for the subsequent offence only in the felony indictment, have pleaded guilty. He asked no questions with regard to the subsequent utterings, although he did cross-examine with regard to the allegation of the previous uttering.

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As appellant had been previously tried (though perhaps the course adopted was not the wisest), the fact that he was not separately arraigned on the subsequent offence did not, in our opinion, lead to any miscarriage of justice in this case.

Appeal dismissed.

A. R.

William Johnson.

WILLIAM JOHNSON.

On a joint indictment for obtaining by false pretences, the acting in concert of the co-defendants must be strictly proved. An accidental misrepresentation to the jury bearing on that point may be a ground for quashing a conviction.

This was an appeal against conviction. Appellant was convicted, jointly with one Jones, on October 21st, at the West Kent Quarter Sessions, of obtaining a pony and cart by false pretences, and sentenced to three years' penal servitude.

Stuart Sankey, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Appellant was jointly indicted with another man, Jones, of obtaining from a Mrs. Murray a pony and cart of the value of £35 by false pretences. Jones pleaded guilty, and the trial proceeded against William Johnson. I submit there was no evidence on which to convict him. The prosecutrix being too ill to attend, her evidence was read at the trial. The jury were misdirected as to the evidence of the prosecutrix. It was essential to the case for the prosecution that the two men should be shewn to have been acting in concert all through. To obtain the cart and pony, Jones had said he was a cart builder, and something also was said about rubber tyres by appellant. The false pretence laid in the indictment was that the cheque for £35 given by Jones was a good and valid order for the payment of the money. In the transcript of the deposition of the prosecutrix, which was read, she was made to say that appellant also said he was a cart builder, and further that he had said he was a friend of Jones. There was

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nothing said to that effect by the prosecutrix in her deposition, and indeed she actually said, in answer to appellant, "I cannot swear you said you were one" (*i.e.*, a cart builder). Appellant conducted his own defence and called the co-defendant. He cross-examined Jones upon this point and whether there was any acting in concert. The line of the prosecution all through shews that the jury must have had in their minds the impression that the most important point was whether or not Johnson was a friend of the other man. Apart from this discrepancy in the deposition of the prosecutrix and the transcript of it as read to the jury by the learned Chairman in summing up, there was no evidence that Johnson knew anything at all about the other man's banking account. No doubt he made some untrue statements, but there was no evidence that he made the false representation alleged in the indictment.

Moreover, the Chairman allowed a constable, who searched appellant, to be asked what he found upon him: the answer included a number of burglarious implements. I submitted that such evidence was not relevant to the indictment and that its only effect could be to prejudice the jury.

A. J. Laurie, for the Crown: My contention is that the charge that they were acting jointly arises from their conduct. They went to the lady's house together, and there were other false pretences, not alleged in the indictment, it is true, but which were evidence that they were not acting in good faith. Moreover, every remark made by Jones was made in appellant's hearing. Both took part in the matter all through, and the false pretence by Jones was made in perfectly clear language. Their conduct was joint conduct all the way along. They were, in my submission, acting in concert.

[AVORY J.: What false pretence do you suggest Johnson made? The statement that he was a carriage builder will not do, because the prosecutrix says in her deposition: "I cannot swear you said you were one." She was thinking of what he said about rubber tyres and drew an inference.]

I quite agree; but they were clearly working together. The

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true question is whether the action of the two men justified the jury in returning a verdict of guilty.

Avory J.: In this case the only false pretence charged in the indictment was the pretence that the cheque for £35 was a good and valid order for the payment of that money; and the question which ought to have been left to the jury, and on which alone they could have convicted Johnson, was whether there was any evidence before them to shew that he knew that that cheque was not in fact a good and valid order for the payment of £35, and that he was a party to the using of a worthless cheque to obtain the pony and cart.

Some strange mistake was made between the reading of the deposition of the chief witness—Mrs. Murray—and the view of it put before the jury. According to the transcript of that deposition when read in Court, she was made to say that Johnson said he was "a carriage builder, a friend of Jones, and came from Peckham." There is no trace in the deposition of her having ever said anything to that effect as to what Johnson said. When the learned Chairman came to sum up he appears to have adopted the view that Mrs. Murray said Johnson did make those specific statements, and he repeated them all to the jury. The jury seem to have been impressed by them, for they desired to ask the appellant whether he and the other man knew each other. There was, therefore, unwittingly a misrepresentation to the jury upon what was a vital part of the case, and which might well have entirely misled them.

But apart from that, there was no evidence whatever to shew that Johnson had any knowledge or reason to believe that the cheque given by Jones was not a good and valid order for the payment of £35. There was no evidence on which he could properly be convicted of being jointly guilty with Jones of obtaining the pony and cart by false pretences. Therefore the conviction must be quashed.

Conviction quashed.

A. R.

ARTHUR GOODWIN AND ARTHUR WILKINSON.

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On a joint indictment for receiving stolen property, joint possession must be strictly proved. A period of honest work between the termination of a sentence and a subsequent conviction ought to be taken into account in passing sentence for the latter.

These were appeals against conviction, by leave of Lush J., and applications for leave to appeal against sentence. Appellants were convicted at the London County Sessions on November 23rd, 1910, of knowingly receiving stolen property. Goodwin was sentenced to twenty-one months', and Wilkinson to eighteen months' imprisonment with hard labour.

Percival Clarke, for the appellants (under s. 10 of the Criminal Appeal Act) who were present: There is some difference between these two cases. As to Goodwin, appellants were charged with breaking into a shop, stealing, and receiving. The shop in question was broken into some time after 10.15 on the night of November 7th or early in the morning of November 8th. At 9 o'clock on the morning of November 8th, the damage was discovered. Up to 5 or 6 a.m. Goodwin's movements can be accounted for. On the night of November 7th he sat down at 10 p.m. in a glassblower's shop and spent the whole night there. After he had been there for about two hours, Wilkinson entered the worse for drink. Wilkinson left the glassblower's at about 5 a.m., and Goodwin at about 5.30. There is some little discrepancy as to time; there were no clocks there; the hours of arrival at the shop broken into are in the nature of guesses, from the fact that work at the glass-blower's shop ceased about one and a half to two hours after their leaving. Goodwin *might* have had an opportunity of breaking into the house. That is the most that can be put against him. The shop broken into was situate about five or ten minutes' walk away from the glass-blower's shop. If however, as is probable, the shop in question was broken into the night before, Goodwin could not have had a hand in it. Could he have done so the morning after? As to this, he makes application to call further witnesses to establish an *alibi*. Now between 5 and 5.30 a.m. a woman who lives round the corner heard footsteps and a voice, which at the trial she said she recognised as the

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voice of Wilkinson. The voice said, according to her evidence, "Arthur, quick." This was the principal witness for the prosecution, and even she admitted at first at the police court that she was not certain. Both appellants are named Arthur. The name, of course, is common enough. As to Goodwin, it is submitted that there was no evidence of his being with Wilkinson. According to the prosecution, they were found together at 7 a.m. in a coffee shop, and the next time was at 10.30 a.m. when they were arrested. If there is no evidence against Goodwin of breaking or stealing, then there can be no evidence on the count for receiving; because, if the watch found on Wilkinson was stolen, it was not in Goodwin's possession or power, nor is there evidence that it was in Wilkinson's possession with Goodwin's knowledge.

When Wilkinson was found in possession of this watch, which formed part of the stolen property, he certainly did ask Goodwin to say whether he had not seen him (Wilkinson) buy it, and Goodwin did say "Yes." But of course Goodwin wanted to help him, and the reply cannot be urged as evidence of any weight against him. The doctrine of recent possession is to be strictly construed, and is jealously regarded by the Courts. There must, it is submitted, be either an actual or constructive possession. There was neither as regards Goodwin. I submit there was no evidence to suggest that the possession of Wilkinson was the joint possession of himself and Goodwin. Goodwin's further evidence will merely go to shew that he was in the glass-blower's house that night and early morning.

As to the summing up, the learned Chairman ought to have drawn the distinction between the two men and kept their cases separate. He should have explained to the jury that it was necessary for them to be satisfied that the watch was in Goodwin's possession. The summing up is directed in reality solely on the facts as they relate to Wilkinson, while at the same time apparently including Goodwin. *Annie Lewis*, 4 Cr. App. R. 96 (1910). I rely on the principle there laid down as applied to these facts to shew that Goodwin was not in actual or constructive possession.

As to Wilkinson. I do not think it will help Wilkinson to call further evidence. He applies merely to call a witness called at the trial. But as to sentence, there is the police evidence that

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he was apparently earning an honest livelihood in 1909, when he was convicted of the shopbreaking. He has been twice previously convicted. In January, 1904, he was sentenced to fourteen days' imprisonment with hard labour, and in 1909 was sentenced to fifteen months' imprisonment with hard labour for shopbreaking. He came out in April last, and between that time and November, a period of six months, he has been earning an honest livelihood at a known shop.

H. F. Cornes, for the Crown: One of the two men must hold the watch. Although the jury did not know it, the two appellants were acquaintances of long standing. They had slept in a common lodging house together.

As to the doctrine of recent possession. There was more than bare acquiescence here on Goodwin's part in Wilkinson's possession. The facts here are not the same as in *Orris*, 1 Cr. App. R. 199; 73 J. P. 15 (1908). *Rowland*, (1910) 1 K. B. 458; 79 L. J. K. B. 327; 74 J. P. 144; 26 T. L. R. 202; 3 Cr. App. R. 277, was also cited.

Goodwin, when the charge-sheet was signed, said, "He is signing our death warrant; we should not have been charged if it had not been for the watch, which I know is not his" (prosecutor's), "as I saw him" (Wilkinson) "buy it for a bob." On his arrest Goodwin said, "You know I have no home; I hope we will have a fair chance; then we shan't grumble."

[Avory J.: That last remark of his means he had been in trouble before.]

Pickford J.: These two appellants were convicted of receiving stolen property. The property in question was stolen from a house between 10.15 at night and 9 a.m. the next morning. Somewhere about 5.30 a.m. a witness for the prosecution said she heard someone's voice saying, "Quick, Arthur." At first she said she could not recognise the voice; then she said it was that of Wilkinson. Both men are named Arthur. It is not a very singular name, and the evidence is certainly not conclusive. The two men were seen in a coffee house together at about 7 a.m., and Wilkinson then had in his possession a watch which was identified by the prosecutor as part of the property stolen from

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his shop. The night time they spent in the house of a glass-blower. Wilkinson came in after Goodwin, and left the next morning at about 5 a.m., Goodwin leaving half an hour later. Goodwin therefore neither came in with Wilkinson nor left in his company. In these circumstances it is not surprising that considerable suspicion attached to Goodwin as well as to Wilkinson, and some suspicion may still linger in the mind. But the question is whether there was evidence on which the jury could find that Goodwin was guilty of receiving. The possession of Wilkinson was not the possession of Goodwin unless they could have been shewn to be acting together in such a way that Goodwin might be said to be holding the watch for both of them. The only evidence is what I have stated, and it does not constitute evidence going to shew that there was a common purpose. There is nothing to identify Goodwin as the man who was spoken to by Wilkinson at 5.30. In these circumstances there was not any evidence of their acting in concert in such a way as necessarily to make the possession of the one that of the other. Unless there was, there was nothing to go to the jury as to Goodwin. It is true he made untrue statements about the purchase of the watch by Wilkinson. He made these statements after arrest, and no doubt made them in order to help Wilkinson; but they do not make evidence of possession. There was no evidence of possession on the part of Goodwin, and as there was no evidence of his being in possession of any other stolen property, the conviction as against him cannot stand. As regards Wilkinson the case is different. The identification of him as being in the neighbourhood of the shop is slight; the witness first said she was not sure it was his voice; but still there was some evidence, and there certainly was clear evidence of his being in possession of a watch, which he said he had bought of a man for a shilling. Therefore there was evidence as against Wilkinson either that he had bought it knowing it to be stolen, or that he had stolen it himself.

Then as to sentence. There was a circumstance in this case which was not sufficiently considered by the learned Deputy-Chairman. All Courts are anxious that persons previously convicted should know that if after coming out of prison they try to get an honest living, that will be considered, even if they commit an offence subsequently.

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Wilkinson was at the time of the receiving working for an employer, and had been there for some six months. There is, of course, no evidence as to the rest of his life, and all we have to go upon is that he was working between April and November

The conviction, therefore, as against Goodwin will be quashed, and Wilkinson's sentence will be reduced to nine months' imprisonment with hard labour, to run from the date of conviction.

Conviction quashed.
Sentence reduced.

A. R.

ALFRED EDWARD STONE.

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In an indictment under the Punishment of Incest Act, 1908, *if there is evidence to go to the jury that the female was a consenting party, they must be clearly cautioned that, if they come to that conclusion, her evidence must be corroborated, as she then becomes an accomplice.*

Semble (*in view of* Ball's case, *above, p.* 31), *that evidence of acts of incest subsequent to the date charged is admissible on the trial of such an indictment.*

This was an appeal against conviction on grounds of law. Appellant was convicted at the Maidstone Assizes, on November 21st, before Grantham J., of incest, and sentenced to three years' penal servitude.

J. W. W. Weigall, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

This appeal is based on two grounds: evidence improperly admitted and misdirection.

The incest charged in the indictment was alleged to have taken place on December 9th, 1909.

The facts of the case were these: The prisoner was at work on the night of December 8th in the Canterbury Market, and came home at about 7.30 a.m. with a very bad face-ache. He sat down by the fire and rubbed something on his face. His sister, Florence, with whom he is alleged to have had connexion, was present at the time together with the mother. The mother went out at 8.30 to take the father his breakfast. Florence went up

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to the first floor bedroom to clear the room out. According to her evidence, he followed her there and then committed the act. He came downstairs shortly after The mother came back at midday and noticed nothing unusual in the demeanour of either brother or sister. The man was still by the fire as she had left him. The girl was seventeen years of age. The mother's story is that the man remained the whole morning by the fire in a drowsy condition from the pain of the face-ache. That constitutes the whole of the evidence as to that day, and it rests on the uncorroborated testimony of the girl. She never told her mother on that occasion.

The subsequent evidence was this. A child was born on the 13th July. There was evidence that the girl had permitted two other acts of connexion by appellant and had never complained to anybody. The medical evidence went to shew that the child was a seven months' child. The effect of the cross-examination of the doctor was, however, to shew that it might have been born from intercourse at an earlier date than December 9th, but not later.

The man left the house at Canterbury early in May of 1910. It is not quite clear when the girl was first spoken to, but it was not till after appellant had left that the mother, noticing the condition of the girl, spoke to her. When the man came back, he indignantly denied the accusation and called the girl "a little liar." Evidence was admitted by the learned judge, after objection by me, of the two acts of connexion on dates subsequent to that laid in the indictment, the one alleged to be three weeks later and the other four weeks later than December 9th, 1909.

My submission is that such evidence is not admissible where the indictment limits the offence to a specific date. *Bond,* (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 533; C. C. R.; *Fisher,* (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176; *Ball,* 5 Cr. App. R. 238 (1910). Channell J. in *Fisher* said: "The principle is clear that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character, and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which

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he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible, because it is relevant to the issue. . . ." All the prosecution have to prove here is the act. Therefore the evidence of subsequent connexion merely goes to prove that appellant is of such a character as to be likely to commit the crime; in short, that he is a bad character. It is quite unnecessary to prove intention or knowledge here. It would be so, no doubt, in some cases of false pretences, even though, as regards the general principle laid down by Channell J., swindling is not different, as regards proof, from any other offence. There is no question here of system, intention, or knowledge.

[Avory J.: The cases of false pretences are all founded on an old case, *Francis*, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; 12 Cox C. C. 612 (1874), as to whether the prisoner knew the thing to be gold or not.]

My submission is that this subsequent evidence does not go to prove the act charged at all. That evidence in no way goes to establish the truth or falsity of the charge in the indictment, which depends entirely on the credibility of the witness for the prosecution—the girl herself. I submit the evidence could not be admitted on the ground on which the House of Lords has admitted evidence of prior acts in the recent case of *Ball* (*a*).

[Pickford J.: In *Ball's* case the prisoners were said to have had connexion on a particular date. In order to shew that you shew connexion two years before. Here, again, a particular date is charged. Is it not just as much evidence to shew connexion three weeks later? I do not see any difference of principle.]

When you have a brother and sister sleeping in the same bed, it does not follow that incest will take place, and, therefore, evidence was admitted in *Ball's* case to show the state of mind or passions. Here the brother and sister were not, as in *Ball's* case, living apparently as husband and wife. Then as to corroboration.

(*a*) See p. 31, above.

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If a subsequent date is admitted, it of course has a very real bearing on the corroboration. The girl's evidence clearly required corroboration, for she was on her own evidence an accomplice. Grantham J. ruled that the fact that a man had incestuous intercourse did not make the other party an accomplice, and that the crime of incest was practically a form of rape. On general grounds, cases of this kind do require corroboration; the girl was an accomplice. But the learned judge would not hear any cases on the general principle and ruled against me. Again, her evidence ought not to have been allowed to go to the jury without a caution. The learned judge in summing up said: "I do not know that you could possibly have a better case to shew the absurdity of the suggestion, which was made by the learned counsel, that no man can be convicted on the uncorroborated evidence of a girl, because, in cases of this kind, you may be quite sure it would be almost impossible to get any corroboration. I am not assuming this man is guilty. . . . it would be almost impossible to get any evidence to corroborate the charge. However, you need not trouble yourselves about that, because it is not the law." Later in the summing up: "To begin with, what is the man she accuses? He is a man who, according to his own confession, has got another girl in the family way. But that is not all, because there is an admission as to the character of this man in this letter. . . . You find him writing to the married sister, who had accused him, and saying: "'But I will own that I did ask Flo to have connexion with me.'" His Lordship here referred to evidence which I think ought not to have been allowed, viz., a communication between appellant and that sister, where he said he could not help Flo because he was paying for a child of his "young lady." Such evidence ought not to be used against him. As to the letter, the man says it referred to something that took place two years back in the month of June. I suggest it merely referred to some indecent liberty.

Then the learned judge proceeded later: "That she had a child there is no doubt. There is not the slightest proof that she had ever been with anybody else at all." It was not incumbent on me to prove that she had been with anybody else. And then the summing up concluded: "After the evidence as to the known character of this man I should think you would have no doubt whatever that the story told by the girl is true, and that he is the

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father of the child." So that the summing up practically tells the jury they must find the man had connexion: and in addition it omits to warn the jury that they should not act upon the uncorroborated testimony of an accomplice. Moreover, the judge's statements as to the man's general bad character must have had great weight with the jury. Apart from the acts of connexion alleged there was no evidence of bad character. The letter I have alluded to was simply dealt with by the learned judge as evidence of the man's bad character. It did not go to prove the charge. It was very much as if a man having been arrested on a charge of theft were to say: "I deny it. You have arrested me because two years ago I was charged or tried to commit an offence and did not succeed." That is all it amounts to. If the evidence really only goes to character and is not definitely connected with the charge alleged in the indictment it is not admissible.

Cases in which evidence of subsequent acts has been admitted to prove earlier acts are *Rearden*, 4 F. & F. 76 (1864), and the other cases referred to in *Bond*. But those were entirely different cases. Evidence was admitted in *Rearden* on the ground that the act charged and the subsequent acts really amounted to one single transaction.

[Avory J.: There is undoubtedly a distinction in these abortion cases. The evidence in those cases is to rebut the defence that the man was using the instrument for a lawful purpose.]

Admittedly; and that is quite a different thing from saying that an act on two other occasions proves an act on another specific date.

[The Lord Chief Justice: *Ball's* case (*a*) may be a decision that prior acts may lead to an inference that an act may be committed on a subsequent date. There may be that distinction between that case and this. (See the judgment of Lord Russell, C.J., in *Rhodes*, (1899) 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 62 J. P. 774; 19 Cox C. C. 182; C. C. R.) When you are dealing with the relation of a man and a woman, a relation which

(*a*) See p. 31, above.

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involves passion as well as the act, evidence of other acts is admissible to shew acts on the specified date. I cannot see why acts after that date should be any less admissible than those before.]

In *Ball's* case the evidence was admissible to rebut a possible defence, viz. that brother and sister were in bed in the ordinary course of things, having nowhere else to sleep. The classification of Bray J. in *Bond* to be exhaustive should include evidence to rebut a defence which would otherwise be open to the accused. *Makin* v. *Att.-Gen. of New South Wales*, (1894) A. C. 64. Further, I submit the evidence tended in *Ball's* case to strengthen the allegation in the indictment; not so in the present case, for if the girl was believed, the evidence was conclusive and was not strengthened by repetition.

Beaumont Morice, for the Crown: As to the question of corroboration. If on the evidence the Court is of opinion that there was consent, of course I am precluded from much of the argument I would otherwise have used. She was a very weak-minded girl. Of course, it is true she did not mention it; but she was upset. And if her story has any truth in it, the case comes under that class where the question is, not of corroboration, but of the weight to be given to her evidence. Under the Incest Act, s. 2, the woman, to be guilty, must consent to the act. I refer to *Graham*, 74 J. P. 246; 4 Cr. App. R. 218 (1910), on the point that corroboration is not legally necessary in some cases under the Criminal Law Amendment Act.

This is a case where we are bound to assume that the girl had been assaulted on three different occasions. That was what went to the jury, although it would no doubt be for the learned judge to draw attention to the weight to be attached to the girl's evidence. Perhaps the summing up of the learned judge does not go as far as is required by the decision in *Graham's* case. None the less, the learned judge commented on the question of corroboration and upon the girl's evidence, and then left it to the jury to decide.

But my submission is that the girl was not an accomplice, and that, therefore, corroboration was not strictly necessary.

[He was then stopped by the Court.]

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The Lord Chief Justice: This is only another instance where very great difficulty arises owing to our inability to order a new trial. There seems to have been an issue here which ought to have been left to the jury, and indeed Mr. Morice agrees in that he said the greater part of his observations would be upon the basis that he took the view that there was no consent.

Mr. Weigall drew attention to the shorthand note where he took the objection at the trial that corroboration was necessary. It is our duty to say that in our opinion Mr. Weigall's point is not sufficiently dealt with. Of course, if upon the evidence there was no ground for suggesting that the girl had consented, then she would not be an accomplice and no corroboration would be required. As to what caution ought to have been given by the learned judge, I will say a word in a moment. The important consideration now is what was the proper view to be taken as to the girl consenting. It is not too much to say that the question whether she consented was never left to the jury at all.

The suggestion that the girl was an accomplice was ruled out by the learned judge, and later, at the commencement of the summing up, the learned judge said it was absurd to suggest that corroboration was necessary. Mr. Weigall raised, in our opinion, a very serious point. The question was raised, was there evidence sufficient to be left to the jury, whether the girl had consented or not? The evidence was that the girl had been in the family way some six or seven months without making any complaint till she was questioned by her mother; and the girl herself gave evidence of there having been acts of connexion three weeks and four weeks later than the date laid in the indictment. It is quite impossible to say there was no evidence to go to the jury that this girl consented on all three occasions. From this point of view the further question arises as to the admissibility of the evidence of the subsequent acts.

Now, looking at s. 2 of the Punishment of Incest Act, the circumstance which seems most serious in this case is that from beginning to end the view was taken that no corroboration was required—on the ground, it is to be supposed, that there was no validity in Mr. Weigall's contention that the girl's conduct was such that she required corroboration.

It does not seem to us that justice could possibly be done if

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the jury was not asked whether the girl did in fact consent; if she did, she would then require corroboration.

Then there was another objection taken, though not so serious, namely, as to the omission of the learned judge to caution the jury. There was in fact no caution how the jury should deal with the case. That point, of course, is based to a certain extent on the same considerations as the question of consent. If the girl did consent, then there should have been, as in *Graham's* case and *Brown's* case (*a*), a caution to the jury by the learned judge as to whether they should act on the evidence of one witness against that of another. Of course, as the appellant had denied the offence on oath, the objection does not seem so serious. However, it is contrary to the recognised practice in these matters.

There is one other matter in the summing up which does not seem satisfactory. We have no doubt as to the admissibility of the letter that has been referred to. It was admissible because it was written by the man himself. In that letter there was one passage upon which the learned judge made very adverse comment, viz., the passage, "but I will own that I did ask Flo to have connexion with me and she refused." Apart from a possible question as to the materiality of his excuse that he was probably drunk at the time of making such a request, the letter contains a specific statement that "Flo has told a lie." [His Lordship read the letter.] So that the letter which contains a statement against himself, and is relied upon as shewing what his character was, also contains a denial of the act charged as having taken place on December 9th. It seems to us, in fairness to the appellant, that, if this letter were going to be used against him in the summing up, it should have been also pointed out that it contained a statement which he had volunteered together with a distinct denial of the offence charged. Immediately following upon the mention of this letter and of the prisoner's excuse in the witness box, the learned judge said: "You have this character of the man. Have you any doubt which of these two you will believe . . . after the evidence as to the known character of this man . . ?" All this has reference to the letter, as well as to the subsequent acts of connexion, and if it was going to be put in that

(*a*) See p. 24, above.

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way to the jury the inference to be drawn on the other side in favour of the man ought to have been put.

With regard to the evidence of the two other offences being admissible, assuming there was no corroboration *aliunde*, it might be to the interest of the defence that they should be proved. We do not wish to throw any doubt on the suggestion of this evidence being admissible.

On the whole, the trial was unsatisfactory. One important question was never put to the jury and there was no proper caution. Consequently, as we have no power to order a new trial, this conviction must be quashed.

Conviction quashed.

A. R.

JOHN HARGREAVES.

John Hargreaves.

If when a previous conviction of a defendant on trial has, by the inadvertence of the court, become known to the jury, they have been sufficiently cautioned against giving any weight to that information, a conviction by them will not necessarily be quashed.

This was an appeal against conviction, by leave of Lush J. Appellant was convicted on November 30th at the Preston Sessions of obtaining a suit of clothes by false pretences, and sentenced to six months' imprisonment with hard labour.

T. G. Brocklebank, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of this appeal is that through some mistake or, it is submitted, carelessness on the part of the court, the fact that appellant had been previously convicted became known to the jury, and that, having regard to the evidence, it was that fact which led the jury to convict. The prisoner did not go into the box. He handed up two statements to the learned Chairman. They were, perhaps, originally fastened together and may have appeared to form one document. The one was a statement of his defence, and the other was a document intended only to be read by the Chairman. It was, of course, only the former that he desired the clerk of the Court to read out to the jury. The clerk, however, proceeded to read the

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latter, which contained references to previous convictions. Thus a fact leaked out which of necessity is never allowed to be known till after verdict. It is true appellant did not object till the clerk had read part of the document, but he is deaf and did not hear what was going on. He was not defended. I submit it was the duty of the Chairman to look carefully at any statement before allowing it to be read out, and to protect as far as possible the interests of the prisoner. It is quite impossible to say here whether the information thus acquired by the jury was or was not the determining factor. It might well have been, as the evidence otherwise was not very strong.

No doubt the learned Chairman did warn the jury on the point. He said: "I must tell you at once you have heard read something that was intended for my ear only"; but he then went on to say that the reading of the document was entirely owing to the fault of the appellant. I submit on the facts as I have stated them that it is impossible to say that there may not have been a miscarriage of justice.

H. B. Copinger, for the Crown, was not called upon.

AVORY J.: That which happened here is a thing that happens not infrequently where a prisoner is defending himself: he did not sufficiently distinguish between facts going to his defence and facts in mitigation. But in the course of the trial when he came to cross-examine the prosecutor he brought out the fact that information had been received by the prosecutor to the effect that he (appellant) was "a wrong one." When the time for putting in his defence came he appears to have handed up two papers, which may or may not have been fastened together. The first sheet I have here relates entirely to the previous bad character of the appellant and contains promises to reform. The second sheet, which is headed "Statement of Defence," relates the facts of this case only. The clerk began to read the former paper, which related to the appellant's previous bad character. The Chairman very properly warned the jury not to allow their minds to be influenced by what they had heard.

Having regard to the appellant's cross-examination of the

prosecutor and the warning given to the jury by the Chairman, we think there was no miscarriage of justice, and therefore this appeal must be dismissed.

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Appeal dismissed.

A. R.

JAMES FITZGERALD.

James Fitzgerald.

Severity of sentence.

This was an appeal against sentence, by leave of Lush J. Appellant was convicted of housebreaking on November 26th at the Middlesex Sessions, and sentenced to 12 months' imprisonment with hard labour.

Appellant, who was present, was unrepresented.

Lawless, for the Crown. At the Middlesex Sessions, housebreaking is always regarded as a very serious offence, on account of the frequency of the offence in the districts within the jurisdiction of the Court. Consequently a heavier sentence is imposed than might otherwise be the case. I am instructed, however, not to press the case. The man was certainly not a very experienced hand; he was taken red-handed at about 6.45 p.m., having broken the glass of the hall door to pull back the catch, together with another man who, according to him, led him into it. The other man, who does not appeal, was a man thirty-eight years of age, and of good character. He was sentenced to thirteen months' imprisonment, and the Chairman ordered his wife and four children to be looked after in the meanwhile. Appellant was out of work and in want.

Pickford J.: In this case appellant is appealing against a sentence of twelve months' imprisonment with hard labour passed upon him at the Middlesex Sessions. It is his first offence, and the sentence is a severe one; and we have been told by Mr. Lawless for the Crown and also by the learned Chairman, who presided there, that housebreaking is a very serious offence in the locality, and that a great many such crimes are committed there. No doubt

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James Fitzgerald.

that was the reason why so heavy a sentence was given, and perhaps another consideration may have been that the appellant, who is a young person, is said to be medically unfit for detention in a Borstal institution. We have taken all these matters into consideration, but, on the whole, we think the term of twelve months is too severe. The sentence will therefore be reduced to six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. R.

James Arthur Berry Heap.

JAMES ARTHUR BERRY HEAP.

Severity of sentence.

This was an appeal against sentence. Appellant was convicted, before Grantham J. on November 30th at the Surrey Assizes, of embezzlement and sentenced to four months' imprisonment with hard labour.

Theobald Mathew, for the appellant. Application was made yesterday for leave to appeal against conviction and sentence and for bail. As the appeal could not, in the ordinary course, be heard before the middle of January, the Court, in view of the shortness of the sentence, consented to hear it to-day, provided notice were given to the prosecution. Leave to appeal against sentence only was granted.

Appellant embezzled three days' takings of a cinematograph theatre, amounting in all to £42 6s. 10d. The facts of the case, which came out for the most part from the cross-examination of the detective inspector, shew that appellant had formerly been in a very good position indeed. He had been managing director of a large firm in the North of England. He went to the Boer War as an officer and was invalided home. Having lost his position in the firm, he obtained a position as manager of a cinematograph show in Richmond, but unfortunately gave way to drink, as he had done before. He took the three days' takings and, according to his own statement, went off to a race-meeting, where he lost the

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money. He had some relatives and friends living at Rochdale and went there to endeavour to get them to help him to replace the money. The money was forthcoming at the police court, but the prosecution did not see their way to take it. It is submitted that the sentence was excessive; the offence was not an embezzlement in the worst sense of the term, because there was not a continuous peculation.

R. E. Moore, for the respondents, supported the appeal for mercy; but, in answer to a question put by the Court, pointed out that appellant disappeared for three weeks, during which he did not communicate with his employers.

The Lord Chief Justice: We cannot allow serious offences to go unpunished, merely because the appellant has been in a good position or performed some public service. These are the very people in whom a higher standard of conduct may be properly expected.

The appellant's statement that he meant all along to return the £42 was an untrue one; he only made the statement after arrest; and the amount tendered by his friends was not forthcoming till some weeks later.

He was sentenced to four months' imprisonment with hard labour, and it is quite impossible to treat this as a case which ought to go unpunished. Having regard, however, to the fact that this was a first offence, and further to the fact that the appellant is not an associate of criminals, we think that it is not necessary that he should associate with criminals, and therefore the sentence is altered to four months' imprisonment in the second division.

Sentence varied.

A. R.

Solicitor for the Appellant—*H. P. Becher.*

Solicitors for the Respondents—*Ellis, Aiglionby & Bickersteth.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON AND MR. JUSTICE AVORY.

JAMES SHAW.

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James Shaw.

Justices sitting at an informal meeting not authorised by statute have no authority to administer an oath.

Conviction quashed on a point of law not taken at the trial.

This was an appeal on a point of law against conviction before Mr. Justice Hamilton at the Leeds Assizes, November 30th, 1910, of having taken a false oath. He was sentenced to four months' imprisonment with hard labour.

T. Cuthbertson for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

The charge against appellant arose out of proceedings which took place on April 12th, before Messrs. Clegg and Styring, two justices of the peace.

On March 30th a protection order had been granted to appellant authorising him to sell intoxicating liquor on certain premises until May 18th, the duly appointed day for the holding of transfer sessions. In order to save time on that day the justices had arranged that certain preliminary work in the way of taking evidence and making enquiries should be done on April 12th, but on that date they did not purport, and in fact had no authority to grant a transfer of a licence. It was not one of the eight special statutory sittings—there is abundant evidence to that effect. One of the justices, Mr. Clegg, before whom the oath was taken on April 12th, was not a licensing justice, and would not have been entitled to sit on May 18th at the licensing court. The oath taken by appellant, which was to the effect that he had paid the valuation out of his

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own money, was not taken before an authority competent to administer an oath, as there was no statutory authority to hold the proceedings on April 12th, nor were the two justices, one of whom was not a licensing justice, an authority of competent jurisdiction. In *Laceby* v. *Lacon & Co.*, (1889) A. C. 222, Lord Halsbury, at 229, says: "It is a delusion to suppose that magistrates may do what is equivalent to this that or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it." There was no legal authority to hold the meeting of April 12th, and even if there was, Mr. Clegg was not a licensing justice, and was not entitled to sit. Therefore, the allegation in the indictment that the two named justices had power to administer the oath was not supported. The clerk proved that it was the habit to hold these preliminary meetings for convenience.

[AVORY J.: Is it not the same as if the applicant met a justice in the street, and was sworn then and there?]

A. J. Laurie, for the Crown. It is admitted that there is no statutory provision for such a preliminary meeting as that on April 12th before the fixed licensing day of May 18th, but it is a common practice both at Sheffield and in other places. It is analogous to the power a police magistrate has of granting a temporary licence under s. 1 of the Licensing Act, 1842. It is submitted that the proceedings on April 12th were the preliminaries to and formed part of the sittings which were fixed for May 18th. The purpose for which the false oath was taken was in view of the transfer proceedings of May 18th. Whether or not this was the sitting of a licensing court, a false oath was taken. A justice has power to administer an oath; he is not restricted to any specific purpose of the oath. No objection was taken at the trial that the two justices had no authority to administer an oath.

He cited *Stone*, Dears. & P. 251; 23 L. J. M. C. 14; 6 Cox C. C. 235 (1853); *Chapman*, 1 Den. 432; 18 L. J. M. C. 152; 2 C. & K. 846; 3 Cox C. C. 467 (1849). Archbold, p. 1185, 26th ed., says: "It is a misdemeanour at common law to take a false oath with a fraudulent intention in a matter of public

concern, although it is not taken in a judicial proceeding, if the oath is administered by a person having power to administer it."

[HAMILTON J. referred to s. 13 of 5 & 6 Will. IV. c. 62, the Statutory Declarations Act, 1835, where the marginal note is, "Justices not to administer oaths, &c. touching matters whereof they have no jurisdiction by statute."]

No difficulty would have arisen if the proceeding had taken place on May 18th. The sitting of April 12th may be deemed to be continuous with it. It must be admitted that Mr. Clegg was not a licensing justice.

Cuthbertson, in reply: The cases cited shew that a false oath to constitute a misdemeanour must have been administered by a person with authority so to do. So much of the case of *Stone* as appears to conflict with this view is a mere dictum.

AVORY J.: In this case James Shaw was indicted on two counts, the first charging him with perjury before two justices of the peace at Sheffield on April 12th, 1910, and the second charging him with the common law misdemeanour of taking a false oath on an application made by him before two justices, "who then and there had competent power and authority to administer the said oath to the said James Shaw, with the intention to deceive the said two justices, and to induce them to grant to him a transfer of the licence of certain premises." The charge of perjury was withdrawn, and the case went to the jury on the charge of taking a false oath. The Court is clearly of opinion that the objections taken by the appellant on the merits of the case, and also as to the summing up of Hamilton J. entirely fail. At the trial appellant's counsel did not take the point that the two justices had no authority to administer an oath, but it is a point open to the appellant now, because the indictment and the evidence taken together do not disclose any offence known to the law. We hold that the justices on April 12th had no authority to administer an oath to the appellant. The sittings for the transfer of licences were fixed to begin on May 18th, and no authority has been shewn to us enabling the justices to begin on April 12th the special business fixed for

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May 18th. The power of justices to administer oaths is a limited power under 5 & 6 Will. IV. c. 62, s. 13, just as there is a limitation to their powers in licensing matters. None of the authorities cited are in conflict with this view. Our decision makes it unnecessary to take into consideration the fact that one of the justices who was sitting on April 12th was not qualified to sit as a licensing justice.

Conviction quashed.

S. M.

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John Seigley.

JOHN SEIGLEY.

A defendant who has given evidence may be re-called, after the close of the case for the prosecution, for cross-examination.

Appellant was convicted on November 30th, 1910, at Lancashire (Preston) Sessions of receiving stolen goods, and was sentenced to six months' imprisonment with hard labour.

H. L. Bridge for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was charged together with James Kearns with stealing 3½ lbs. of brass and one zinc ring. Both Kearns and appellant gave sworn evidence at the police court, and their signed statements were put in by the prosecution at their trial. In this statement appellant said: "Kearns's evidence is a lie from beginning to end."

He also said that he had been asked by Kearns to sell the stuff, the subject of the charge, to the prosecutor. In cross-examination he was asked whether prosecutor would not be breaking the law by buying such a small quantity of metal (less than 56 lbs.), and the answer was "Yes."

"Q.—Do you think he would have bought it? A.—Yes.

Q.—You are positive that he would have broken the law? A.—He always did."

The appellant returned to the dock, and subsequently counsel for the prosecution applied for leave to recall him in order to cross-examine him as to his previous convictions. Appellant's counsel objected, on the ground that the imputation on the prose-

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cutor was only made in answer to questions put in cross-examination, and that the case for the prosecution was closed, and it was not open to them to call further evidence. Eventually the Chairman recalled the prisoner, and he was cross-examined as to his previous convictions. Kearns was acquitted.

The imputations, if any, made against prosecutor were made only in consequence of the question put by counsel for the prosecution. He was induced to make them because of the way in which the questions in cross-examination were framed. His statements were nothing more than a development or elaboration of his original defence. The same observations apply to appellant's alleged imputations against Kearns; he never alleged that Kearns stole the stuff, but he did say that Kearns was telling lies whenever his account differed from appellant's account. Counsel cited *Grout*, 26 T. L. R. 60; 3 Cr. App. R. 67 (1909); *Rouse*, (1904) 1 K. B. 154; 73 L. J. K. B. 60; 20 Cox C. C. 592; 68 J. P. 14; C. C. R.; *Bridgwater*, (1905) 1 K. B. 131; 74 L. J. K. B. 35; 21 Cox C. C. 737; 69 J. P. 26; C. C. R.; *Preston*, (1909) 1 K. B. 568; 78 L. J. K. B. 335; 2 Cr. App. R. 24; 73 J. P. 173; and further submitted (1) that the appellant having returned to the dock, it was too late to recall him for cross-examination, and (2) that the Chairman, in summing up, had omitted material parts of the evidence.

Pritt, for the Crown, was not called upon.

Hamilton J.: There was no misdirection, and the summing up was sufficient. A prisoner, when once he has made himself a witness, is liable, like any other witness, to be recalled for the purpose of answering such questions as the judge permits to be put to him. The Chairman was quite right in allowing the questions as to the previous convictions of the appellant. The Court is always inclined to interpret the answers of a prisoner in a way favourable to him, and the prosecution is not entitled to ensnare the prisoner into making an attack on the prosecution. In this case there was no ground for saying that the prosecution had laid a trap for the prisoner, but it is not necessary to decide whether the prisoner made an attack on the prosecution, and the Court expresses no opinion upon it. The cross-examination is

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clearly permissible under the third sub-section of s. 1 (*f*) of the Criminal Evidence Act, 1898. The statement of the appellant made allegations of fact quite inconsistent with those sworn to by Kearns, and necessarily involved the guilt of Kearns, who was charged with the same offence as the appellant.

Appeal dismissed.

S. M.

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Thomas O'Brien.

THOMAS O'BRIEN.

On an indictment for riot, there may be a conviction for common assault.

This was an application referred to the full Court for leave to appeal against conviction on a point of law. Appellant was convicted with one Jeffery on 3rd January, 1911, at the Surrey Sessions, held at Kingston, of common assault on an indictment for riot, and was sentenced to twelve months' hard labour.

H. W. Rowsell for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. There were two indictments against the prisoner, (1) for riot, and (2) for unlawfully assaulting an officer of the workhouse in the execution of his duty. There was also in the second indictment (but not in the first) a second count for common assault. Appellant pleaded not guilty to both indictments; he was tried on the first indictment only, and found guilty of a common assault, and the two charges under the second indictment remain on the file of the Court.

Although on an indictment for inflicting grievous bodily harm, matters of aggravation may be disregarded, and the prisoner found guilty of a common assault, the appellant here cannot be convicted of common assault when charged with riot, because the two offences are distinct in kind, and one is not an aggravated or intensified form of the other. The case of *Sudbury and Heaps*, 1 L. Raymond 484; 2 Salk. 593—4 (1690), shews that riot is a specific offence, and the battery is not laid as a charge of itself, but as a part of the riot, and if a defendant is acquitted on the charge of riot, he is also acquitted from the charge of assault contained in the same indictment.

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In *Day and Cox*, 11 Cox C. C. 505; 22 L. T. 452 (1870); C. C. R.; the Court held that the prosecuting counsel having withdrawn the counts for common assault from the jury and having elected to proceed only on the first count (assaulting and wounding while poaching by night), a conviction for a common assault under the first count could not stand. Willes J. stated that a defendant could not be properly convicted of a common assault on the first count. Counsel also cited *Yeadon*, 9 Cox C. C. 91; L. & C. 81; 31 L. J. M. C. 70; 5 L. T. 329 (1861); C. C. R.; and *Taylor*, L. R. 1 C. C. R.; 38 L. J. M. C. 106; 11 Cox C. C. 261; 70 L. T. 402 (1868).

[The Lord Chief Justice referred to *Hollingberry*, 4 B. & C. 329; 6 D. & R. 345; 3 L. J. K. B. 226 (1825).]

Clarke Hall for the Crown. In *Sudbury* the indictment could have been quashed as bad on the face of it. In law a riot cannot occur where not more than two persons take part in the proceedings. In this present case the indictment exactly followed the form set out in Archbold, p. 1218 (24th ed.), and on that form of indictment a jury may acquit of riot, and convict of rout, unlawful assembly or assault; see also *ibid.*, pp. 227, 228.

In this case the Chairman held that it was doubtful whether there was sufficient evidence that people were terrorised, and it was for that reason he advised the jury to find the prisoner guilty of common assault only.

Rowsell, in reply: The indictment was not bad on the face of it in *Sudbury*. The verdict could not stand because in that case the jury had acquitted all but two of the prisoners.

Avory J.: The appellant was convicted together with George Jeffery at the Surrey Sessions of an assault on one of the labour masters or officials at Belmont Workhouse. The indictment charged that they, together with divers others to the number of ten and more, did "unlawfully riotously and routously assemble, &c. to disturb the peace . . . . and then and there being unlawfully riotously and routously assembled did make an assault and unlawfully riotously and routously did beat, wound, and illtreat," &c., &c. The latter part of the indictment which

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alleges the assault admittedly contains all the words necessary to constitute an indictment for a common assault. It would not have been necessary to make any further or other allegations in framing an indictment for a common assault as a separate offence, and the Chairman was quite right in directing the jury that they could convict of a common assault. The case of *Sudbury and Heaps* is no authority for the contention of counsel that on an indictment for riot there cannot be a conviction for common assault. All that case decided is, and it is good law now, that the offence known as riot is not committed unless three or more persons participate in the riotous proceedings. The principle cited from Archbold, p. 228, correctly describes the law: "At common law a defendant may be convicted of a less aggravated felony or misdemeanor on an indictment charging a felony or misdemeanor of greater aggravation, provided that the indictment contains words apt to include both offences. In other words, it is not necessary to prove the offence charged in the indictment to the whole extent laid, provided that the facts proved constitute an offence punishable by law, of which the defendant may by law be convicted on the indictment." *Hollingberry* (above).

Application dismissed.

S. M.

Samuel Hill.

SAMUEL HILL.

Severity of sentence. Distinction between penal servitude and preventive detention.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. The appellant was convicted before the Chairman at the County of London Sessions, on 7th December, 1910, of larceny and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

The Appellant in person gave particulars of the efforts he had made to earn an honest living since he came out of prison on October 8th, 1910, till his re-arrest on November 16th, and contended that his sentence was too severe, being, in effect, nine years' penal servitude (for stealing a stepney wheel, value 21*l.*, from

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a motor car), as he had a year's *remanet* to serve in addition. He had pleaded guilty on account of his bad record, but was not really guilty.

G. L. Bannerman, for the Crown, was not called upon.

The Lord Chief Justice: All that could be said for the appellant in this case was most favourably put to the jury by the learned judge, and the question whether he was a habitual criminal or not was left to the jury after the Chairman had clearly and carefully gone through all the facts of the case. The appellant was released from prison on October 8th, and committed the present offence on November 16th.

Besides the three statutory convictions proved against him, there were five other serious offences, for two of which he had been sentenced to terms of five and six years' penal servitude respectively, as well as three long terms of hard labour. The appellant suggests that had not the Chairman been desirous of imposing a term of preventive detention he would have passed a much lighter sentence, and that he imposed three years' penal servitude for the sole object of passing a sentence of preventive detention. This is quite untrue. The Chairman in his judgment expressly stated that having regard to the past career of the appellant, the smallest sentence he could pass would be, in any circumstances, three years' penal servitude, and apart from the new Act, this must have been so. It is not correct to say that a sentence of three years' penal servitude followed by a sentence of five years' preventive detention is equivalent to a sentence of eight years' penal servitude. During the term of preventive detention prisoner may be released at any time or dealt with in any way that seems proper to the authorities, and his sentence must be reviewed every three years at least. It is intended that the man who is able and willing to do work during the period of preventive detention shall receive substantial benefits under the Act. The Act was only passed in 1908, and did not come into operation until 1st August, 1909, and as offenders have to serve a preliminary term of penal servitude, it is not possible for any practical effects of the Act to be seen until 1912.

Appeal dismissed.

S. M.

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George Thomas Ashworth.

GEORGE THOMAS ASHWORTH.

On a joint indictment for larceny or receiving stolen property the cases made against each defendant must be carefully distinguished to the jury.

To convict one defendant of receiving, the exclusive possession of another must be negatived.

This was an appeal against conviction and sentence by leave of Bankes J. Appellant was convicted at Lancashire (Preston) Sessions on 5th January, 1911, with George Cowburn of stealing two geese, and was sentenced to three years' penal servitude.

J. E. Singleton, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was no direct evidence that appellant stole the goose recovered, or that the goose was ever in his possession, or that it was ever in the joint possession of him and Cowburn, or that appellant was ever with Cowburn when Cowburn had the stolen goose in his possession. There was not a particle of evidence against him except (1) the allegation, which was denied, that he said to the constable, "I know nothing about the goose," before the word goose had been mentioned or referred to; one witness gave another version of this incident, viz., that appellant said nothing till the police asked him about it; (2) the allegation that he said, "This is a mess," when the constable who had Cowburn in custody passed him, and (3) he was heard to say to Cowburn, "Why did you tell that man?" Though the appellant was separately defended, no sufficient differentiation was made by the Chairman between the two prisoners' cases. His summing up of the case may have led the jury to think that appellant's acting in concert with Cowburn after the goose was stolen (without its ever being in appellant's possession or joint possession), was sufficient to justify a conviction. Further, the Chairman, in leaving the case to the jury, never referred to appellant's evidence.

D. N. Pritt for the Crown. The evidence is that the goose was stolen between 8.30 p.m. on December 13th and 10 a.m. on the 14th, that the two prisoners were together that night, and slept in the same lodging house. The goose was found in the possession of Cowburn next evening, and there are also appel-

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George Thomas Ashworth.

lant's remarkable statements to the police. Further, on each of two occasions on which Cowburn visited the house at which he left the goose appellant was waiting outside for him.

Singleton, in reply, cited Archbold, p. 634 (24th ed.): "Even if there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains with the thief, a conviction for receiving cannot be maintained," *Wiley*, 2 Den. 37; 20 L. J. M. C. 4 (1850). This, at least, ought to have been pointed out to the jury.

The Lord Chief Justice: The appellant appeals against a conviction for having, together with one Cowburn, stolen a goose or received it well knowing it to have been stolen. It is not easy to say on which charge he has been convicted, but in either case we consider the trial unsatisfactory. The theft took place on the evening of December 13th, and on the following evening the dead goose was at Cowburn's wife's house. Appellant is alleged to have known it was stolen, because of three remarks made by him at various times. We have considered those three remarks separately and together, and while we do not say there was no evidence to go to the jury, in our opinion the jury ought to have been carefully directed as to what the possibilities of the evidence were with regard to the meaning of those remarks.

It was essential to distinguish between the cases against the two men, and the jury ought also to have had their attention distinctly drawn to the appellant's story. The jury ought to have been told that Cowburn was either the thief or the receiver, and that appellant could not, on the evidence given, be found guilty of stealing, nor could he be found guilty of receiving unless some evidence was given to shew that the goose was not always in the *exclusive* possession of Cowburn. The jury ought to have been directed that appellant could not be convicted of larceny if he did not know except when Cowburn subsequently informed him, that the goose had been stolen, and the jury ought further to have been told that the so-called incriminating expressions were also consistent with appellant's innocence.

Conviction quashed.

S. M.

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Robert Roy, *alias* William Ellison.

ROBERT ROY, *alias* WILLIAM ELLISON.

A sentence of penal servitude is not necessarily to be imposed because it was imposed by the last previous sentence.

Appellant was convicted of larceny, at Rochester City Quarter Sessions, on October 10th, 1910, and sentenced to three years' penal servitude. The Lord Chief Justice had granted leave to appeal against sentence.

Appellant in person. The sentence is too severe. I have earned an honest living ever since my discharge from prison on 29th January, 1910, and the offence for which I have been found guilty, stealing a pair of boots, does not require a sentence of three years' penal servitude.

Beaumont Morice, for the Crown: Prisoner concocted the defence, and bolstered it up with perjury. He also had had several previous convictions, including one sentence of penal servitude.

Hamilton J.: Having regard to all the circumstances we think the sentence excessive, and that it should be reduced It is true that in 1904 appellant was convicted of burglary, and in 1905 he was convicted of a grave offence (not dishonesty), and in 1907 he had three years' penal servitude for larceny. In consequence of his present offence, he will have to serve nearly four years (there being a *remanet* from his last sentence), in addition to the three months' imprisonment he suffered while awaiting trial. There is not, and should not be, any hard and fast rule making it necessary to pass a sentence of penal servitude immediately after a former sentence of penal servitude. The learned Recorder seems to have thought that the offence was aggravated by the circumstances of the defence, especially by the story which he considered involved perjury. We do not think it necessary for this purpose to regard the defence in that way, and consider that the sentence should be reduced to twelve months' imprisonment with hard labour.

Sentence reduced.

S. M.

EDWARD McCANN.

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23 *January*
Edward McCann.

The Court requires strict proof that an appellant sentenced to detention in a Borstal institution was twenty-one years of age on the date of his conviction.

Appellant was convicted of larceny, at Preston Sessions, on the 4th January, 1911, and sentenced to three years' detention in a Borstal institution; leave to appeal against this sentence was granted by Bankes J.

The appellant was not present; the ground of his appeal was that he was convicted on his twenty-first birthday, and consequently was too old to be sent to a Borstal institution.

A. J. Laurie, for the Crown, admitted that if appellant was convicted on his twenty-first birthday, he would, in the eyes of the law, be more than twenty-one years of age. *Toder* v. *Sansam*, 1 Brown's Parliamentary Cases, 469 (1775), where it was held that a man who was born between 5 a.m. and 6 a.m. on August 16th, 1725, and died about 11 a.m. on August 15th, 1746, had attained the full age of twenty-one years, as the law does not regard portions of a day. There are some Acts which contain the expression, "if it shall appear to the Court." The words of s. 1 (1) of 8 Edw. 7, c. 59, the Prevention of Crime Act, 1908, are: "where . . . . it appears to the Court that the person is not less than sixteen nor more than twenty-one years of age."

In this case the only evidence before the Court was his age given in the calendar as twenty. This Court has held, in *Turner*, (1910) 1 K. B. 346; 79 L. J. K. B. 176; 74 J. P. 81; 3 Cr. App. Rep. 103, that under s. 10 (2) (a), by which the jury must find on evidence that prisoner is over sixteen before they can convict him of being a habitual criminal, the age in the calendar may be sufficient evidence on which to act.

Now in this case appellant's age appeared in the calendar as twenty, and he never informed or suggested to the Court that he was older, and neither at his trial nor subsequently here has any legal proof been tendered as to his exact age.

The Lord Chief Justice: It is so manifestly to the advantage of the appellant that he should have the benefits of the Borstal

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system that we do not propose to take for granted anything that need not be taken for granted. By the Prevention of Crime Act, 1908, the appellant was liable to be sent to a Borstal institution if it appeared to the Court that he was not less than sixteen nor more than twenty-one years of age. In this case it did appear to the Court that he was not more than twenty-one years of age. The Court was informed that he was twenty years old, and had no reason to doubt it.

Appeal dismissed.

S. M.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE HAMILTON AND MR. JUSTICE AVORY.

WILLIAM JOHN KENDRICK.

1911
30 *January.*

William John Kendrick.

The Court may mitigate sentence on evidence of a period of honest work, not before the Court of trial.

An officer of the Court ought not to give informal information to the Court in aggravation of defendant's offence.

This was an appeal against sentence by leave of the full Court. Appellant pleaded guilty at Bedford County Sessions on January 4th, 1911, on two indictments for larceny, and was sentenced on each to concurrent terms of four years' penal servitude.

A. R. Churchill for appellant (under s. 10 of the Criminal Appeal Act), who was present. The Chairman in passing sentence took into consideration charges against appellant which he did not admit, and which should not have been taken into consideration. There were two warrants out against him in respect of alleged offences at Stafford and Bristol respectively, and the Chairman was informed by the police-officer that appellant admitted these charges, and desired to come out of prison "with a clean sheet." Appellant, however, in reply to the Chairman, denied that he was guilty of the offences charged in the two warrants. A sentence of four years' penal servitude for stealing the articles charged in the indictment is so excessive that it can only be explained by supposing that the Chairman wrongly took the other two charges into consideration. Counsel for the prosecution, indeed, contended that these matters, as well as the articles found at his lodgings and alleged to connect him with a "long

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William John Kendrick.

firm," might be taken into consideration for sentence, as shewing what kind of a man he was. I also complain of the unjustifiable remarks of the Clerk of the Peace before sentence was passed. His intervention caused the Chairman to believe that the appellant had done nothing in the way of earning an honest living.

On this point counsel called a witness who proved that appellant had been working with him for many months at a factory, and that he left towards the end of the year of his own accord, and was not discharged.

Ryland Adkins, for the Crown. It is quite clear that the Chairman in his sentence did not take into account the charges in respect of which the warrants were issued, nor was he asked to do so by counsel for the Crown; but he had regard to the many previous convictions against appellant, and also to the large number of trade bill-heads, circulars, and business cards of "Shaddick & Co." found in appellant's lodgings. He was a convict on licence, with a *remanet* of 306 days.

DARLING J.: The appellant pleaded guilty to stealing a Gladstone bag, a silver watch and chain, and an overcoat, the property of one person, and a violin and bow, the property of another person. He was a ticket-of-leave man, and had in addition to and at the end of the sentence to be imposed for these offences, to serve a *remanet* of 306 days. He denied that he was guilty of the two offences (in the nature of "long firm" frauds) at Stafford and Bristol, in respect of which warrants had been issued, and we accept the report from the Chairman that he did not take those charges into consideration in the sentence of four years' penal servitude which he passed. It is true that there are five previous convictions against the appellant, and he was sentenced to four years' penal servitude in 1902, and three years' penal servitude in 1908, but we have heard evidence to-day which was not before the Court on January 4th, and that evidence shews that appellant was not a habitual criminal, but had for a long time worked hard and earned an honest living.

We regret that before sentence the Clerk of the Peace interposed the observation, "ten days' drunkenness may have given him the necessary Dutch courage to steal these particular things at that particular moment, but he has deliberately held himself

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William John Kendrick.

out to be the senior partner of a firm which does not exist, and got money in that way." We consider the remark officious and uncalled for, and there was no evidence in support of it. In all the circumstances we consider the sentences of four years' penal servitude unduly severe, and we shall substitute for them two concurrent sentences of eighteen months' imprisonment with hard labour; after the expiration of this sentence, he will in the ordinary course have to serve the 306 days. In this sentence we have not taken into consideration the two charges against appellant in respect of which the warrants have been issued at Stafford and Bristol. These are still pending, and on his release from prison the appellant is liable to be tried.

Sentences reduced.

S. M.

JOE FREDERICK CHARLTON.

Joe Frederick Charlton.

The verdict and recommendation of a jury must be considered as a whole. If they find specifically guilty, the verdict cannot be set aside because they express doubts on points of detail.

Severity of sentence.

This was an appeal against conviction on a point of law. Appellant was convicted at the West Riding (Sheffield) County Sessions on January 7th, 1911, of an attempt to obtain money by false pretences, and was sentenced to twelve months' imprisonment in the second division.

Jardine, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The offence alleged is that known among miners as "mottying." It consists of obtaining payment for another man's work by changing the labels on the tubs of coal. The verdict of the jury is inconsistent. Appellant was found guilty with a strong recommendation to mercy, and the foreman of the jury when asked for the grounds of the recommendation, said: "Our grounds is because there seems so much conflicting evidence and doubt about the case,

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Joe Frederick Charlton.

and the things in one particular," and in answer to a further question the foreman said: "There is various doubts in our minds as to various points of evidence that has been brought forward, that that is the reason we have arrived at it." The verdict of the jury is inconsistent and unreasonable, and amounts to a verdict of not guilty. *Rutter*, 73 J. P. 12; 25 T. L. R. 73; 1 Cr. App. R. 174 (1908).

The Chairman's summing up misled the jury—it was wrong for him to say, "if you are satisfied that the witnesses for the prosecution have spoken the truth, it will be your duty to find the prisoner guilty." All the evidence in the case was circumstantial, there was no direct evidence, and it was quite possible for prisoner to be innocent, although the witnesses for the prosecution spoke the truth.

The sentence is too severe—the Chairman said he failed to see why the jury recommended appellant to mercy, and he disregarded the recommendation, which he had no right to do.

J. A. Symmons, for the respondents, dealt shortly with the evidence and contended that the jury's doubts referred to immaterial details, and the further answers of the jury proved that they had no doubt as to the guilt of the prisoner.

[He was stopped.]

AVORY J.: It has been contended that the verdict in this case cannot stand as a verdict of guilty, that it is unreasonable and repugnant. If a verdict is on its face inconsistent, this Court can refuse to allow it to stand, but it is clear in this case, when the answers of the jury are taken altogether, that they amount to a verdict of guilty with a recommendation to mercy. The jury said specifically that their verdict was guilty, that the charge against appellant was true, and that they were satisfied that he had committed the offence he was charged with. They recommended him to mercy, it is true, but this Court is aware that recommendations to mercy are not always based upon logical grounds. There was a large amount of detail in the case, and it lasted a long time, and there is no doubt that the jury meant that the evidence of appellant, in opposition to some of the witnesses for the prosecution, produced in their minds some doubt as to the small points in which the evidence conflicted, and this doubt was prob-

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Joe Frederick Charlton.

ably intensified by the speech of the prisoner's counsel, but on the main question of the prisoner's guilt in obtaining this money by false pretences they had no doubt. The verdict accordingly cannot be interfered with. As regards the sentence, the Chairman very properly called the offence of robbing a fellow miner in a mine as "despicable," and the sentence cannot be considered excessive, and will run from the date of conviction.

Appeal dismissed.

Solicitors for the respondents—*Clegg & Sons,* Sheffield.

S. M.

THYRA COURT.

31 *January.*
Thyra Court.

Severity of sentence.
Unsupported suggestions by the police of other offences ought not to influence sentence.

Appeal against sentence. Appellant was convicted at the Middlesex Sessions on January 9th, 1911, of knowingly receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour. She was indicted jointly with four others, against two of whom no evidence was offered; the other two were acquitted by the jury, one of these being a man named Sharpe.

Appellant in person.

H. J. Turrell, for the Crown: It appeared that appellant lived with the man Sharpe, and it was stated by the police, after verdict, that the woman had no doubt been disposing of property which Sharpe and two other men—who had been convicted on other charges—had stolen. There was no previous conviction against her, and counsel for the Crown stated that probably one or other of the men organised the theft, and that the woman was acting under the influence of the man with whom she cohabited. She, herself, put the theft on a man who had been convicted of larceny in the same house as that from which this property had been stolen.

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Thyra Court.

DARLING J.: There is not the slightest doubt upon the evidence that appellant was properly convicted of receiving property knowing it to have been stolen. We think that she was influenced by the man with whom she was living to get rid of the goods. She has not been convicted before, and no evidence was given in support of the police statement that she had disposed of stolen property on other occasions. This seems to have influenced the learned Chairman, who also remarked that there was a great deal of housebreaking in Middlesex. In the circumstances we think that the sentence of twelve months' hard labour was excessive, and we reduce it to one of six months' hard labour to date from January 9th, the date of the conviction.

Sentence reduced.

S. C.

William Birkett.

WILLIAM BIRKETT.

Severity of sentence.

Where a defendant has been convicted for an offence committed before another for which he has been convicted and served his sentence, the Court will, as far as possible, adjust the sentence at the later trial to that which would have been adequate for both offences, had they been considered at the earlier trial.

Appeal against sentence. Appellant was convicted at the Anglesey Quarter Sessions, on January 4th, 1911, of obtaining money by false pretences, and was sentenced to six months' imprisonment with hard labour.

Appellant was not present, and was not represented.

It appeared that in November, 1909, appellant stole a cheque book in Dublin. He came over to Holyhead, where he presented a cheque, which he had taken from the book and filled up, and obtained 2*l.* therefor. He was arrested and taken back to Dublin, where on February 10th, 1910, he pleaded guilty to stealing the cheque book, and was sentenced by Dodd J. to twelve months' imprisonment with hard labour. On the expiration of that sentence on November 13th last, he was re-arrested, and tried as stated.

The ground of appeal was that all the facts connected with

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Holyhead case were before the Irish Court when the first sentence was passed.

The Court stated that Dodd J. had reported that he did not take cognisance of any charge in Wales against the prisoner, but that had he done so, and been satisfied that the two charges were of the same nature and connected together, he would not, in all probability, have passed any longer sentence. The Anglesey Court was not aware of the conviction in Dublin.

Darling J.: This Court has the advantage of a report from the learned judge who tried the case in Dublin, which was not before the Chairman of Quarter Sessions, and we think that we ought to give effect as nearly as possible to the course which would have been taken by Dodd J. had he been able to take cognisance of the offence in Wales at the time he was passing sentence for the offence in Ireland. We cannot quite put ourselves in the position of the learned judge, because appellant has served part of his sentence, but the sentence will be reduced to one of twenty-eight days' imprisonment with hard labour, to date from the day of his conviction, so that he will be entitled to be released to-morrow.

Sentence reduced.

S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON AND MR. JUSTICE AVORY.

EDWARD WILSON, JAMES LEWIS AND FREDERICK HAVARD.

1911
7 *February.*

Edward Wilson, James Lewis, and Frederick Havard.

The Court will not receive in evidence affidavits purporting to shew that, owing to newspaper reports or other matters, local prejudice against an appellant made a fair trial impossible.

Corroboration of an accomplice's evidence need not amount to independent evidence implicating defendant.

Application for leave to appeal against conviction and sentence, and appeals against conviction on a certificate granted by Lush J. at the trial.

Wilson (applicant) and appellants were tried at Haverfordwest Assizes on January 12—14th, 1911, and convicted, Wilson with one Rees Evans, of burglary, and Lewis and Havard of being accessories before the fact to the burglary, and of receiving the stolen property. Evans pleaded guilty, and gave evidence for the Crown implicating the other three prisoners, who were sentenced, Wilson to sixteen months', Lewis and Havard to fourteen months' imprisonment with hard labour, respectively. Wilson was not present and was not represented.

Lewis and Havard were trading in partnership as marine store dealers, and Evans's story was that they induced Wilson and himself to commit the burglary at a house about eight miles out of Haverfordwest, that Havard drove them in an open cart concealed under a tarpaulin to a spot near the scene of the burglary on the afternoon before it was committed, and that, on the following morning before daylight after it was committed he and Lewis conveyed them with the booty in two sacks back to their yard in the same cart; that the booty was placed in their harness-room, and that Havard then cashed a cheque, out of the proceeds of which he paid them, and they left the two sacks there.

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Abel Thomas, K.C. (with him *Harold Stowe*) for appellants, who were present, after stating the facts of the case, argued two points: (1) There was a general verdict of guilty on the indictment, but not sufficient corroboration of the story of Evans the accomplice as to the receiving, and none as to the inciting. The main points of corroboration were, (a) that witnesses swore to seeing Havard driving on the afternoon and in the direction spoken to by Evans, with a strange man (not identified) beside him; (b) that Havard did cash a cheque at the bank as stated by Evans; (c) that the two sacks of booty were found by the police buried in a garden not in the joint occupation, and easily accessible from the yard, of the two prisoners. This was not corroboration in a material particular implicating the accused: it was only corroboration of Evans's general story, if anything. He cited *Farler*, 8 C. & P. 106 (1837); *Robinson*, 4 F. & F. 43 (1864); *Pratt*, 4 F. & F. 315 (1865).

The accomplice was proved a liar in a material part of his story.

[Avory J.: If the jury find part of an accomplice's story corroborated they are entitled to believe the whole.]

(2) Counsel tendered affidavits as additional evidence for the purpose of shewing that it was impossible for the prisoners to have had a fair trial at Haverfordwest owing to local prejudice, fostered by erroneous statements in many newspapers, some published in those parts and some in London. The Court has power to consider such evidence: Criminal Appeal Act, s. 1 (7), and s. 4 (1). *Lee*, 24 T. L. R. 627; 72 J. P. 253; 1 Cr. App. R. 5 (1908). This matter would be no ground for interfering with a trial otherwise satisfactory, but where that is not so, the Court can take it into consideration. The Court must consider if there was bias.

[Hamilton J.: You might have applied to commit for contempt of court, or to remove the indictment into another county.]

The question of contempt arose in the vacation, and the vaca-

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Edward Wilson, James Lewis, and Frederick Havard.

tion judge (Evans P.) declined to deal with it as vacation business.

The Court ruled that the affidavits could not be read.

Lord Tiverton (*B. Francis-Williams, K.C.*, with him) for the respondent. There is no legal bar to a conviction on the evidence of an accomplice alone, provided the judge sufficiently warn the jury of the danger of it. *Atwood*, 1 Leach, 464 (1788), per Buller J.; *Jones*, 2 Camp. 132 (1809), per L. Ellenborough C.J.

[The Lord Chief Justice cited the judgment of Cave J. in *In re Meunier*, (1894) 2 Q. B. 415; 63 L. J. M. C. 198; 18 Cox C. C. 15; 71 L. T. 403.]

In this case Lush J. carefully warned the jury not to convict unless on the corroborative evidence they believed the testimony of Evans. There were a number of points in Evans's statement which he would not have known unless he had been with the prisoners.

The Lord Chief Justice: In this case affidavits were tendered the purport of which apparently was (1) that in the county of Pembroke there was such a strong feeling that nobody charged with breaking into this particular house could possibly have a fair trial; (2) that there was a local feeling against the prisoners because they had been making too much money; (3) that the jury were prejudiced by certain newspaper statements. If facts are brought before the Court on evidence which tend to shew that there has been a miscarriage of justice, or that there was a mistrial, as was suggested in *Crippen's case* (*a*), we must of course consider them. But we must decide this matter upon principle, and having regard to the duty placed upon us by the Criminal Appeal Act, there could be nothing more foreign to the jurisdiction of this Court, in a case where there has been a proper summing up on proper evidence, than to enter upon the question whether the state of local feeling was such that the jury would not have

(*a*) See 5 Cr. App. R. 255 (1910).

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found a proper verdict. The application to-day is without precedent or principle.

With regard to the question of corroboration, there was in this case an abundant caution—if anything, too strongly expressed. It must not be supposed that corroboration is required amounting to independent evidence implicating the accused. The principle referred to in the passage cited from *Farler* requires careful application. It may be another question what is the effect of the somewhat similar words "implicating the accused" used in certain statutes. In addition to *Attwood's* case, I would refer to the words of Maule J. in *R.* v. *Mullins,* 3 Cox C. C. 526 (1848), at 531: "Confirmation does not mean that there should be independent evidence of what the accomplice relates, or his testimony would be unnecessary"; and to the words of Cave J. in *R.* v. *Meunier:* "I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground." In this case there was a sufficient caution to the jury, and, moreover, there was corroborative evidence on which the jury could properly act.

Application and appeals dismissed.

Solicitor for Appellant—*W. J. Jones,* Haverfordwest.
Solicitor for Respondent—*C. W. M. Price.*

A. S. C.

William James Murtrie.

WILLIAM JAMES MURTRIE.

An incriminating statement made in defendant's presence is inadmissible against him on his trial if he denies the allegation shortly after it is made.

This was an appeal by leave of Bankes J. against conviction.

C. Mellor for appellant, who was on bail. Appellant was convicted at the West Riding (Sheffield) Quarter Sessions on January 6th, 1911, for receiving some furs, knowing them to have been stolen, and was sentenced to six months' imprisonment with hard labour. Immediately before his trial a man named Brock

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was tried by the same jury for receiving part of the same property from the same thief, one Hodgson, in similar circumstances, and acquitted. Hodgson pleaded guilty. The date of the alleged thefts and the identification of the property were vague and unsatisfactory. On December 16th, 1910, Hodgson was arrested on a charge of stealing other furs. On December 23rd, 1910, Hodgson having admitted stealing these particular furs as well, appellant, who was not then in custody, was taken by a detective and confronted with Hodgson in person, when Hodgson said: "That is the man to whom I sold these furs." Appellant had already given the detective his version of the way he became possessed of the furs, which agreed with the evidence for the prosecution. He did not immediately deny Hodgson's statement, but a few moments later, when formally charged, he did so. At the trial appellant was undefended, the above facts, including Hodgson's incriminating statement, were given in evidence by the detective, and appellant called Hodgson, who denied appellant's complicity, and withdrew the statement he had made, saying that he was persuaded by the police to make it. The Chairman, instead of directing the jury to disregard the evidence as to Hodgson's statement, as required by *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 5 Cr. App. R. 7, 65, said in his summing up: "It is most unreasonable to suppose that Hodgson had the words put into his mouth by the detective." Thus, he not only used the statement first made as evidence against appellant, but he also used Hodgson's contradiction in the box as further confirmation of appellant's guilt by saying that no sane man would believe it, and that it made appellant's case worse. Further, he did not warn the jury against their being unduly influenced by either statement. The effect was that the jury were to believe the statement in prison rather than the denial in the box.

G. Glover Alexander for the Crown. Hodgson had not been charged with stealing these particular furs when he made the statement, though he had been charged with regard to some others stolen from the same prosecutor. Appellant did not immediately deny the statement, though he did so soon after. Apart from this, there was other evidence on which the jury could have convicted.

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HAMILTON J.: Although the appellant said nothing when Hodgson actually made the statement, still, when he was himself charged he said: "I received nothing from that man. I am innocent." We are of opinion that it must be treated as all one conversation. It is impossible to regard the manner in which this matter was dealt with by the learned Chairman as unlikely to cause a miscarriage of justice, especially as the case against appellant was in any case a weak one.

Conviction quashed.

Solicitor for Appellant—*J. Gray,* Barnsley.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE HAMILTON.

DOUGLAS CAMPBELL.

1911
13 *February.*

Douglas Campbell.

Severity of sentence.

The practice of the police giving the Court, when about to pass sentence, all the information they possess about the defendant, though it may be hearsay or not strictly proved, is legal, and is recognised by s. 10 (5) *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act,* 1908.

The duty of the Court in such circumstances explained.

Appeal from the order of Bankes J., refusing leave to appeal against sentence. Applicant was convicted at the Central Criminal Court on January 19th, 1911, before the Common Serjeant, for obtaining money by false pretences, and sentenced to three years' penal servitude.

H. D. Roome, for the applicant, who was not present, asked the Court to give a ruling as to the propriety of the practice of police officers giving hearsay evidence after conviction, with a view to the increase of sentence. In this case there was one previous conviction, but in addition to this a large number of other matters, which had never been the subject of any charge, had been narrated. The prisoner was taken by surprise, and wished to give an explanation of some of these matters. Moreover, all of them except certain minor matters involving no criminal offence, had been similarly stated at the trial of the previous conviction, and must be taken to have been disposed of then. The prisoner had the intention of carrying on his business (a scholastic agency) honestly: he was an educated man and a gentleman, who had held a good position as an Army coach. In these circumstances the sentence was too severe.

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Douglas Campbell.

The Lord Chief Justice: There is no reason to interfere with this sentence on the ground that it is too severe. Nor, in our opinion, is the fact that the prisoner was a man of education any ground for lenient treatment.

We have been asked to say something about the practice of police officers giving the judge the result of their enquiries about prisoners. In ordinary circumstances we should not accede to such a request, but as the matter has recently been under the consideration of the judges and the Home Office, we think it right to do so. For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the Court what he knows about the prisoner as the result of enquiry, where it would involve great difficulty and expense to prove the facts by legal evidence. On some circuits, notably the Northern, this duty has been very well carried out, and very full information, often favourable to the prisoner, was regularly supplied to the Court. On other circuits the practice has not been so satisfactory. Some years ago I gave instructions that on all circuits steps should be taken to place accurate information of this character before the Court. The practice has been recognised by statute in s. 10 (5) of the Prevention of Crime Act, 1908: that section was inserted in order to adapt to the procedure under that Act for the conviction of habitual criminals this practice which had long been recognised. At times, no doubt, police officers on these occasions say more than they ought to say against prisoners; but there is nothing to shew that that occurred in this case. It is important to consider what the action of the Court should be when it is suggested that some of the statements are not correct. If the prisoner wishes to deny anything, he can, especially if he is represented by counsel, do so at the time. In this case he had every opportunity of doing so, and it does not appear that he now wishes to contradict the statements, but merely to urge some extenuating circumstances. If the prisoner challenges any statement it is the duty of the judge to enquire into it; if necessary he should adjourn the matter, and if it is of sufficient importance he may require legal proof of it. Or he may ignore it, and if he does so he should state that he is not taking it into consideration. If the prisoner does not challenge the statements, the Court may take them into consideration, and no injustice is likely to be done. Very often it is in

the prisoner's interest that his antecedents should be stated: if it is not so, that is not the fault of the police, but of the antecedents.

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Application dismissed.

A. S. C.

Solicitors for the Applicant: *Arthur Newton & Co.*

CHARLES GOODSPEED.

Charles Goodspeed.

Verdicts of guilty upon a count for being accessory before the fact to a burglary, and upon another in the same indictment for receiving property stolen in the burglary, are not repugnant.

Mere non-fulfilment of a promise to aid and abet is not a countermand of the crime.

This was an appeal against conviction on a certificate granted by Mr. Commissioner Lumley Smith. Appellant was convicted at the Central Criminal Court on January 16th, 1911, on charges of being accessory before the fact to a burglary, and of receiving some of the stolen property, and was sentenced to eighteen months' hard labour.

A. S. Carr, for appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted with two other men who pleaded guilty, for burglary at the Cathedral House, Southwark, and for receiving. The only evidence implicating him was contained in statements made by himself to a police officer who approached him in a public-house, representing himself to be a dealer, and asking if he had anything to sell. There is a preliminary objection that he has been convicted on both counts of this indictment, which are alternative counts, and the verdict is therefore self-contradictory. A person cannot be convicted of receiving when the facts shew that he is the actual thief, or even aiding and abetting him. *Coggins*, 12 Cox C. C. 517; 29 L. T. 469 (1873); C. C. R. It is true that in that case he was actually present, and it may be that if he had been indicted as an accessory this point could not be taken; but the prosecution having

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taken advantage of 24 & 25 Vict. c. 94, the Accessories and Abettors Act, 1861, to "indict, try and convict" him as a principal, must accept the disadvantage, and he must now be taken to have been convicted as a principal.

[*H. T. Wright*, for the Crown: This point has been disposed of in *Hughes*, Bell, C. C. 242; 29 L. J. M. C. 71; 6 Jur. N. S. 177; 1 L. T. 450; 8 W. R. 195; 8 Cox C. C. 278 (1860).]

There was no evidence on which he could be convicted on either count. The only words which could make him an accessory were: "They would have had more if I had gone with them; I promised to, but did not go." It should have been pointed out to the jury that he denied the use of these words. But as they stand they do not make him an accessory: he must be shewn to have taken some active part in instigating the commission of the crime. *Taylor*, L. R. 2 C. C. R. 147; 44 L. J. M. C. 67; 32 L. T. 409; 23 W. R. 616; 13 Cox C. C. 68 (1875). Perhaps he was a conspirer, but not an accessory. The whole of the information about the property was obtained from an evening paper. He had no control over the other prisoners, because it is apparent that though he promised to put the thieves in touch with the officer, he failed to do so. Moreover, an accessory has a *locus poenitentiae*, he may countermand the crime even if he has instigated it, and the words used shew that he did so. On the receiving count the authorities would be conclusive in his favour.

H. T. Wright was not called on.

Lord Coleridge J.: In this case the prisoner appeals against a conviction as accessory before the fact to a burglary and as receiver of the stolen goods. The first point taken on his behalf was that the convictions on the two counts were inconsistent, but an accessory is not the actual thief, and there is no inconsistency in his being also the receiver. The point is concluded by *R.* v. *Hughes* (above). We refrain from deciding the question whether the conviction on the receiving count could be sustained. That would depend on whether the evidence shews that the prisoner had control over those who actually had the goods in their possession. But we are clearly of opinion that he was an accessory before the fact.

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Charles Goodspeed.

If he promised to accompany the burglars that is quite sufficient, and the mere fact that he did not carry out his promise does not amount to a countermand. If he had carried it out he would have been a principal.

Appeal dismissed.

A. S. C.

WILLIAM MYLAND.

William Myland.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court, granted on February 7th. Appellant was convicted of obtaining two shillings and sixpence by false pretences, before the Recorder of Leeds on January 12th, 1911, and sentenced to five years' penal servitude.

Valentine Ball, for appellant (under s. 10 of the Criminal Appeal Act), who was not present.

There were nine previous convictions beginning in 1892, but there was a period from October, 1898, to January, 1901, when apparently prisoner abstained from crime. The last sentence was three years' penal servitude in January, 1908, from which prisoner had only been released about six months when the present offence was committed. Although his record is not good there are indications that in the intervals he was a good workman, and several employers have sent characters, some offering to take him back. In the circumstances the maximum sentence was too severe.

A. J. Laurie, for the Crown, was instructed not to dispute these facts or to press the matter.

The Lord Chief Justice: The question of the amount obtained is not always of importance, for instance where the charge is in respect of one of a number of sums obtained by the prisoner, or where small amounts are obtained from a large number of people. But here the offence of obtaining this half-crown appears to have been an isolated one. No doubt prisoner has a bad career—

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nine convictions in eighteen years. But it is sometimes desirable, especially where there is some indication of a desire to do honest work, not to give a severe sentence merely because of a long list of previous convictions. If after a lenient sentence the prisoner falls back into crime, of course one of much greater severity should then be imposed. This should be brought to prisoners' notice, both as an incentive and a warning. The sentence will be reduced to twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. S. C.

George Lane.

GEORGE LANE.

Sentence reduced in view of fresh evidence.

This was an appeal, by leave of Bankes J., against conviction and sentence of twelve months' imprisonment with hard labour at London County Sessions, on January 12th, 1911, under the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 7 (3).

Stanley R. Crawford, for appellant (under s. 10 of the Criminal Appeal Act), who was present.

It is a necessary ingredient of the offence that there should be two previous convictions for crimes as defined by s. 20 of 34 & 35 Vict. c. 112, the last within seven years and on indictment. It is submitted that the first should be *ejusdem generis* as the second, and also on indictment. Both must be strictly proved, either by production of a record as provided by s. 18 of that Act, or in the manner provided by s. 13 of 14 & 15 Vict. c. 99, the Evidence Act, 1851. *Penfold,* (1902) 1 K. B. 547; 86 L. T. 204; 50 W. R. 671; 66 J. P. 248; 20 Cox C. C. 161; C. C. R. Here a constable proved one conviction, and stated that on that occasion a previous one had been proved. There were three convictions, one not within s. 20. There is nothing to shew which even purported to be proved. The other was trivial, and if the jury had heard the particulars they might have taken a different view.

A file found on appellant on his arrest was one which he used honestly for sharpening saws. Witnesses could be called to prove this, and to shew that he did honest work when he could. 1911 13 *February.* George Lane.

[The hearing was adjourned in order that these witnesses might be called.]

Crawford called a witness who proved selling the file to appellant and seeing him sharpening saws, and another to character. Appellant had been in prison five weeks. 20 *February.*

Ernest Wetton, for the Crown: Appellant was entering two or three doorways of shops in turn at 4 a.m.; he was violent on arrest, and refused any account of himself.

The Lord Chief Justice: This case is not free from difficulty. The new evidence has removed, to a certain extent, the inference which the jury may have drawn from the possession of the file. A man may have lawful possession of an instrument and yet use it for an unlawful purpose. But it has been established, at all events, that he may have obtained the file for a lawful purpose. But the jury might well have thought from the fact of his going in and out of shop doors when it was not raining that he was there for an unlawful purpose. He refused information, and was violent. Innocent people should remember that if they are charged, the sooner they give a full account of themselves the better for them. In this case the maximum sentence was passed, and we are of opinion that this new evidence, even if it had not led the jury to acquit, might well have been taken into consideration by the Deputy-Chairman. Appellant will be released to-day.

Sentence reduced.

A. S. C.

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Walter Beeby.

WALTER BEEBY.

A judge should not express his view of the facts of a case in such a way as to lead the jury to believe that the questions of fact are withdrawn from them. Proviso to s. 4 (1) of the Criminal Appeal Act applied, despite misdirection.

This was an appeal against conviction on a point of law and an application for leave to appeal against conviction on fact and sentence. Appellant was convicted of attempted arson before Ridley J. at Huntingdon Assizes on January 18th, 1911, and sentenced to five years' penal servitude.

E. E. Wild (who defended at the trial), for appellant, who was present, based his objections to the conviction mainly upon the conduct of the trial by the learned judge. There were five distinct fires at the farm where appellant was employed, and where his father had for thirty-six years been farm bailiff; the first four took place on the night of Saturday, October 22nd, and during the Sunday; the fifth on the Monday, about 2 p.m. Appellant was tried in respect of the last fire only, but by general consent the whole story was gone into. The first and main fire was seen by appellant at 3 a.m. on Sunday; he gave the alarm in his night-shirt. Four stacks were burnt, and a steam chaff-cutter, which was standing by, was injured. It is a remarkable fact that it was burnt most at the end furthest from the stacks, *i.e.*, at the driving end, and the general opinion then was that it had caused the fire by getting over-heated. The brigade put the fire out, but never poured any water on the stacks themselves. Soon after they had left another small fire was found among some stack-cloths by appellant's father and sister. Appellant had then for some time been asleep. Later in the evening he, with two other farm labourers, witnesses for the Crown, went out and discovered a third fire under the boards in the meal-house, at some distance from the stacks. A fourth fire occurred about 10 p.m., which appellant discovered. On the Monday, about 2.0, appellant was seen by a police inspector close to the door of this meal-house, and on going in, the inspector found two sacks saturated with tar and recently set alight. Appellant was found a few minutes later washing his hands, but no trace of tar was seen. Another labourer named Draper was not far from this meal-house at the time.

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This man had been many times convicted, and the prosecution having discovered this since the hearing before the magistrates, stated that they did not wish to call him. Yet the learned judge insisted on his going into the box. He suggested that I had thrown suspicion on him, which was not the fact. On the other hand, the learned judge stated in the hearing of the jury that a witness for the defence was an untruthful witness. This was while he was in the box, and in summing up he referred only to those passages of his evidence which told against appellant, ignoring those which were in his favour. My principal complaint, however, is that from the very beginning of the case to the end the learned judge laid it down that each of the five fires must have been the work of an incendiary, and that the same person. I endeavoured to shew that at all events the first four were accidental, that the first was caused by the chaff-cutter, and the others either by sparks from the first, or by fire working underground through the peat. But the judge stopped me whenever I cross-examined to this effect, asked to know my case thereon before I had commenced to cross-examine, refused to allow me to ask questions on the point of my own witness, interrupted me when addressing the jury upon it, and specifically directed the jury, both during the hearing and in his summing up, that it was not a question for them. He also directed them—although not so strongly as on the question of incendiarism—that the person who lighted the fires must have been an inmate of the farm, that he must have been the person who gave the alarm, and that appellant was the only person present at the fifth fire. In fact, his direction was based entirely on the assumption of appellant's guilt. Where the judge decides facts instead of leaving them to the jury, the conviction ought, it is submitted, to be quashed, and the proviso to s. 4 (1) of the Criminal Appeal Act cannot apply. *West*, 4 Cr. App. R. 179 (1910).

H. St. J. Raikes, for the Crown, was only called upon to deal with the criticisms upon the learned judge's alleged assumption that the fires must all have been the work of an incendiary. It was pointed out to the jury from the first that it was not the business of the Crown to prove that appellant was connected with any of the first four fires, or to shew that they were the work of an incendiary, but merely that the fires had occurred and

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that appellant had had the opportunity of causing them, or some of them, if he had so desired. The learned judge only took a strong view on the evidence as to the first four being incendiary. It was proved, as regards the first fire, that the chaff-cutter was not over-heated; the engine-driver disposed of that theory, and the interval was also too long. As regards the second, third, and fourth fires, the soil of the stack-yard was not peat, but silt, and the roadway between the buildings and the stack-yard was made up of a hard material, so the fire could not have made its way underground from the site of the first fire. There was also no connection between the building where the second and third fires took place and that where the fourth broke out. There was therefore strong ground for the judge to think that the first four fires could not have been caused by accident, but after expressing the view that they were not so caused, the judge told the jury clearly that they had not got to decide that question, nor whether appellant had caused them.

[The Lord Chief Justice: As to those four the summing up is fair, the jury are sufficiently warned: it is not put that prisoner had done those.]

As to the fifth the learned judge pointed out why, on the evidence, it must be incendiary; and what he in effect says, is: "Can you, as reasonable men, have any doubt that it was so?"

The Lord Chief Justice: We have given this case most anxious consideration. Everything possible has been urged by Mr. Wild, but we cannot interfere. Reading the summing up, against which his attack was mainly directed, and following it carefully, it appears that after the first passage, so far as the facts are concerned, it is closely and fairly reasoned: attention is directed to the real main issue—whether appellant lighted the fifth fire—and the evidence upon it is fairly set out and marshalled. Mr. Wild was not able to criticise effectively any part of that part of the summing up. His attack amounts to this: that the judge, in effect, withdrew from the jury the question whether the fifth fire was incendiary, and in connection with the history of the case that he also withdrew the question whether some of the earlier fires were not accidental. To form a fair

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judgment on this attack one must remember that the only question tried was as to the fifth fire: did the appellant light the sacks or did he not? The earlier history was by general consent and quite rightly gone into, for if it could be shewn that appellant could have had nothing to do with any one of the first four, that would be strongly in his favour. We see plainly from the newspaper report which Mr. Wild has handed to us, that he was running the double case, either that the first four fires were accidental and therefore the fifth must have been accidental, or that if it was an incendiary fire someone else was involved. But in this state of things the learned judge did make some remarks upon which we must comment: the time and manner of some of these observations was extremely unfortunate. We are unanimously of opinion that all five of these fires were of an incendiary character, and that no fair-minded person could come to any other conclusion, but from this point of view that is not material. However strong a judge's view may be of the evidence he should leave questions of fact to the jury, and it is unfortunate that his interlocutory remarks and the early part of his summing up, and no doubt the way in which the observations were made, could lead the jury to believe that there was no issue for them in that matter, and if they had any doubt his final observation might have been fatal to that doubt. There was no doubt a strong impression, if not a conviction, on the judge's mind, but a judge must remember that questions of fact are for the jury. Now, those expressions were unfortunate at that time and stage of the trial, but are we justified in interfering? No doubt there was a strong expression by the judge that the question of incendiarism was not worth arguing. I agree with the words of Lawrance J. in *West* (above): "A judge must not put himself in the position of the jury as regards the decision of facts. The proviso to s. 4 (1)" of the Criminal Appeal Act "does not apply where the judge decides facts instead of the jury." If we had come to the conclusion on the evidence that there was any doubt whether these expressions of opinion could have misled the jury or really have withdrawn from them anything that they might have considered, we should not have allowed this conviction to stand. But we are satisfied that upon this evidence the jury could have come to no other conclusion except that these fires were the work of an incendiary. Their questions shewed

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that they appreciated the issues. In view of the depositions it was proper that the witness Draper should be called and cross-examined, although counsel for the Crown openly said that without corroboration he would not rely upon him. The conviction must therefore stand. With regard to the sentence the judge thought properly that if he was convicted he must have been connected with three of the first four fires. The sentence was therefore not too severe, but it may date from the conviction.

Appeal dismissed.

Solicitors for the Appellant—*Bendall & Sons*, Newmarket.

A. S. C.

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27 *February.*
Henry Francis Culliford.

HENRY FRANCIS CULLIFORD.

The Court will quash a conviction as a habitual criminal if the judge at the trial puts to the jury a previous conviction which is not proved at all.

This was an appeal, by leave of Horridge J., who extended the time of appeal, against conviction as a habitual criminal, and an application for leave to appeal against a sentence of five years' penal servitude for larceny.

Appellant was tried before Grantham J., at Monmouth Assizes on February 22nd, 1910, upon two indictments; in the first he was charged in the first count with the larceny of a pair of boots, jointly with a man named Churn: he pleaded guilty and Churn was acquitted; the second count charged him with being a habitual criminal, of which he was convicted. The second indictment charged him with assaulting a police officer, of which he was also convicted. He was sentenced to five years' penal servitude for the larceny, and five years' preventive detention as a habitual criminal.

Lort-Williams, for appellant (under s. 10 of the Criminal Appeal Act), who was present.

The principal ground of the appeal is that before any evidence was given on the charge of being a habitual criminal, the learned judge read out to the jury a list of nine convictions, most of which were never proved at all.

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Appellant was twice convicted, in 1883 and 1884, as a boy, for minor offences. He was next convicted in 1899, and after that on five occasions. The last sentence was three years' penal servitude for stealing. For that offence he was in prison till the 15th October, 1909. He committed the present offence on the 18th December, 1909.

He stated that during the interval he had worked for seven weeks potato picking with Churn for a farmer at Penrith, in Westmoreland, and was discharged because there was no more work to do. He was corroborated in this by Churn. The police made enquiries of the farmer, who stated that two men of the description of Culliford and Churn had worked for him, but as he had so many men working, he could not say definitely whether they were the men or not. In these circumstances the police did not call him, and no other evidence was given as to appellant's record since his release on the 15th October, except his own statement that he had been a burglar for twenty-five years. This statement he now described as a jest, and said that he had served fifteen years in the army and navy. The period exactly coincides with the gap in the appellant's record between 1884 and 1899, but the police had made no enquiries as to what he was doing at this time, although he had given them the names of witnesses who could prove his statements to be correct.

The learned judge in summing up simply stated to the jury that, upon his own confession, he had been a burglar for twenty-five years. He did not direct them as to the improbability of this statement having regard to prisoner's record. He failed to direct their attention to the period between 15th October and 18th December, 1909, *Kelly*, 74 J. P. 167; 26 T. L. R. 196; 3 Cr. App. R. 248 (1909); *Wells*, 5 Cr. App. R. 33 (1910); or to the fact that the only evidence with regard to prisoner's record during that period was in his favour.

Although the nine previous convictions which the learned judge read to the jury were all in the notice served upon him, only three were proved at all, and in two of those no certificate was put in.

[The Lord Chief Justice: We have decided that that is not essential. It is enough if some person proves that he was present at the time of the previous conviction and heard the prisoner convicted. The Prevention of Crimes Act of 1871, s. 18, lays

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down that it may be proved by "other legal evidence," though the same thing is not actually mentioned in the Prevention of Crime Act of 1908.]

Franklin, 74 J. P. 24; 54 S. J. 217; 3 Cr. App. R. 48 (1909); and *Chatway*, 5 Cr. App. R. 151 (1910), only shew that convictions, other than the three required by the statute, need not be proved with the same strictness as those three. There must be some proof of them. *Stewart*, 4 Cr. App. R. 175; 74 J. P. 246 (1910), is precisely in point and in my favour.

A. J. Lawrie, for the Crown: This Court has held that three convictions may of themselves be sufficient. *Waller*, (1910) 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 26 T. L. R. 142; 3 Cr. App. R. 213. The reading out of the other convictions by the learned judge was, at the most, misreception of evidence, and therefore the conviction should stand if this Court thinks that the verdict of the jury would have been the same if they had not been read out: see *Atherton*, 5 Cr. App. R. 235 (1910); *Stoddart*, 2 Cr. App. R. 217; 73 J. P. 348; 25 T. L. R. 612 (1909). The notice to the prisoner stated the other convictions, and he never disputed them. This notice had been put in as evidence, and was before the jury. The jury would, therefore, on that evidence have come to the same conclusion. Further, there is no evidence now of his having done work. His first story was that he had worked for Abbott in the mines. It was only after the police had given evidence that some men resembling prisoners had worked for Abbott as potato pickers that the prisoner changed his story and said he had worked as an agricultural labourer, and then at potato picking, for seven weeks. He never said himself that he had done potato picking until his notice of appeal a year after the offence. October 15th to 3rd December is not the potato picking season: so no miscarriage of justice can arise in respect of the work he had done.

HAMILTON J.: There is no ground for interfering with the sentence of five years' penal servitude for the larceny. The appellant had for some time been carrying on a career of crime. He was convicted of burglary in 1905, and of shop-breaking in 1906, and he was only released from the last sentence of three years' penal

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servitude on October 15th, 1909. Moreover, he assaulted the constable on his arrest. The conviction as a habitual criminal must be quashed. The appellant had been properly served with notice of the convictions dating back to 1883, but the learned judge, no doubt by inadvertence, read out from the Calendar the list of previous convictions, including a sentence of three years' penal servitude in 1901 for arson, and none of these convictions were proved. It is not possible to say that this did not influence the jury. As Jelf J. said in *R.* v. *Stewart*, "every conviction adds one more chance to conviction as a habitual criminal." In this case the proof of appellant's criminal life since his release is unsatisfactory, for the police had written to the contractor for whom he said he had been working, but had received no definite reply. It cannot therefore be said that the jury might not have come to a different conclusion if the unproved convictions had not been read out to them. The effect is the same, although they were read out before the evidence was given, instead of in the summing up. The learned judge did not, in summing up, qualify them, by pointing out that they had not been proved and must not be acted upon: we leave open the question what the result would have been if he had done so.

Conviction as habitual criminal quashed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE AND MR. JUSTICE HAMILTON.

BENJAMIN BROWN.

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Benjamin Brown.

Where there has been a proper caution to a jury as to an accomplice's evidence, corroboration thereof is not necessary in law.

This was an appeal by leave of Horridge J. against conviction. Appellant was convicted of incest before Ridley J. at Chelmsford Assizes on February 3rd, 1911, and sentenced to four years' penal servitude.

G. F. Emery for appellant (under s. 10 of the Criminal Appeal Act), who was present. The previous conviction was quashed (*a*) on the ground that the jury were not warned of the danger of convicting on the uncorroborated evidence of an accomplice. In this case I must admit there was a caution, but I say there was no corroboration. Evidence which is equally consistent with the guilt or innocence of the accused, though it may confirm a part of the accomplice's story, is not corroboration such as is required (cf. *Finch* v. *Finch*, 23 Ch. D. at 277; 1883: "Evidence which is consistent with two views does not seem to me to be corroborative of either," *per* Lindley L.J.). There are several matters which in his summing up the learned judge described as corroboration. The mother proved that on dark mornings it was her custom to get up first, and that appellant would then order the daughter to come up to his room with a lamp. and it was at this time that the daughter alleged that one of the offences took place. But this was merely a matter

(*a*) See above, p. 24.

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of household arrangement, and there is nothing to shew any guilty purpose in it. Then a postman proved that on Saturday evenings appellant used to wait for the daughter and walk home with her: but this is equally consistent with fatherly care in order to protect her from interference in a rough neighbourhood. Against that the wife's evidence shewed the improbability of the daughter's story. During all this period she was washing the girl's clothes, and saw no sign to suggest any impropriety. There was no complaint. Where the direction to the jury is that something is corroboration which is not really sufficient the conviction cannot stand. *Everest*, 2 Cr. App. R. 116, 130; 73 J. P. 269 (1909). Nor can it stand without corroboration, even if there is a caution. *Stone*, 6 Cr. App. R. at p. 96 (1910). There was a letter put to appellant in cross-examination, which may be interpreted as some admission with regard to the other daughter, though the effect of it is to deny her story. In any case it cannot be corroboration of this case. The inference in appellant's favour from the letter ought to have been pointed out (*Stone*). *Mason*, 5 Cr. App. R. 171 (1910), is also in my favour.

Holford Knight for the Crown. In the previous case of the same appellant the Court said, "if we could have seen that the rule (as to caution) had been observed we should not have upset this conviction." The only question raised by this appeal is the question as to what is corroboration. It is submitted that corroboration is not a fixed principle of rigid application. The degree of corroboration required has in the past varied in strictness according to the nature of the offence and the degree of complicity of the accomplice. (Archbold, 24th ed., p. 456.) The rule laid down by Lord Abinger in *Farler*, 8 C. & P. 106 (1837), approved in *Everest* (above), is that the corroboration must affect the identity of the accused. In this case the matters relied upon all affect the identity of the accused. They are slight in themselves, but the cumulative effect is considerable—the matter of the lamp, the story of the Saturday evenings, and the fact that when the girl complained that her courses had stopped, appellant said it must be due to a cold bath, which she had in fact had. There is also the doctor, who said that the girl had had frequent intercourse with someone.

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These points are not disputed by appellant. At the close of the case for the prosecution Ridley J. asked the jury whether they wished to hear any more; they did, and appellant then gave evidence and was cross-examined. As the learned judge points out, that altered the case, and the jury found further corroboration in the prisoner's evidence.

The Lord Chief Justice: In this case the proper caution was given. It would not be right in every case to direct a jury not to act without corroboration. The appellant here went into the box; he voluntarily introduced the other case, and swore he never had anything to do with either daughter. His own letter was then properly put to him, in which he admitted some degree of indecency with the other daughter. There was, moreover, evidence of repeated opportunities of committing the offence, and we think the direction was quite proper.

Appeal dismissed.

A. S. C.

EDWARD WITTON.

Edward Witton.

Conviction quashed in view of fresh evidence.

An application for leave to appeal against conviction, referred by Horridge J., and to call further evidence, was made on February 20th. Applicant was convicted at Birmingham City Sessions on January 27th of unlawful wounding, and sentenced to eighteen months' imprisonment with hard labour.

H. T. Wright for applicant (under s. 10 of the Criminal Appeal Act). The case turned entirely on identification, and was not very strong. The witness whom it is desired to call can prove an *alibi* at one of the material times. His name was called outside the court at the trial, but although he had been summoned he did not answer.

The application was granted.

H. T. Wright, for appellant (under s. 10 of the Criminal Appeal Act), who was present, called a witness, *G. Roberts,*

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who deposed that he was with appellant at the time of the assault upon prosecutor at some distance from the house where it was committed, and later went to the house at the invitation of the witness who identified appellant as the assailant at the trial; there he attended to prosecutor's wounds, and afterwards saw appellant come in. The sessions lasted five days; the witness attended the first three days, but was unable to be away from his work any longer.

By leave of the Court another witness named *Wine* was called, whose proof was not in appellant's possession when the application was made. He corroborated *Roberts*.

D. H. J. Hartley, for the Crown, did not press the conviction.

The Lord Chief Justice: The identification by one witness before the jury was not satisfactory. Had appellant been able to call the witnesses we have heard, the jury would in all probability not have convicted. His inability to do so at the trial has been satisfactorily explained.

Conviction quashed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE AND MR. JUSTICE PICKFORD.

BENJAMIN CALDWELL.

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Benjamin Caldwell.

Murder.

Application for leave to appeal refused when the Court was of opinion that fresh evidence tendered would not have affected the verdict.

This was an application for leave (1) to appeal against conviction for murder, referred to the full Court by Mr. Justice Phillimore: and (2) to call further evidence. Applicant was tried on March 2nd. 1911, at Durham Assizes, and sentenced to death by Avory J.

L. G. Hoare for applicant (under s. 10 of the Criminal Appeal Act), who was not present. Applicant might properly have been found guilty of manslaughter, but there was not sufficient evidence of malice or premeditation to justify a verdict of murder. He had not had the opportunity of calling a seaman, one William Albert Buckley, who could have given most material evidence. This witness went to the police station after applicant's arrest, and wished to give evidence on his behalf, and prove that he had been treated with great violence by the deceased. The Superintendent merely took a note of his name, but did not call him or keep him available as a witness. The interval between the murder and the violence alleged by Buckley was so infinitesimal that evidence of the violence was most material to the applicant's case. This provocation would necessarily reduce murder to manslaughter. It was not until the night before the trial that the Court requested me to defend appellant, and when I had the opportunity of talking to him on the morning of the trial he was

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in such a dazed and confused state of mind that he did not make me appreciate the importance and materiality of Buckley's evidence.

Lowenthal, for the Crown, was not called upon.

The Lord Chief Justice: The applicant was convicted of the wilful murder of George Harvey on November 21st, 1910. There was a strong recommendation to mercy by the jury: the learned judge concurred in that recommendation, and we also concur in it, and we hope that this expression of our opinion will be communicated to the Home Secretary. This is essentially a case for the discretion of the Home Secretary, but no grounds have been shewn to justify any intervention by this Court. No objection whatever is taken to any part of the summing up by the learned judge. The applicant was not called to give evidence, and as far as we can see, his counsel exercised a wise discretion in not calling him. With regard to the calling of Buckley as a witness, counsel informs us that if he had had a fuller opportunity of considering the probable effect of his evidence, he might have decided to call him, but he frankly tells us now that he does not definitely state that he would have called him. In our opinion the evidence of Buckley would not have affected the verdict. The arguments in favour of reducing the crime from murder to manslaughter—the drunken condition of the applicant, the absence of premeditation, the disturbance on the ship, the provocation received, the injuries inflicted on him—were fully placed before the jury, and we see no reason to disagree with their verdict, and this appeal must accordingly be dismissed.

Application dismissed.

S. M.

JOHN THOMAS BATES.

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John Thomas Bates.

If the consent of the Attorney-General has not been obtained to a prosecution under 46 *Vict. c.* 3, *the Explosive Substances Act*, 1883, *as required under s.* 7 (1) *of that Act, the Court has no jurisdiction to try, and in such a case the proviso to s.* 4 (1) *of the Criminal Appeal Act*, 1907, *does not apply.*

This was an appeal against conviction on a point of law, and also an appeal from the order of Phillimore J., refusing leave to appeal against sentence and legal aid.

The appellant, who was not present, was convicted on February 11th, 1911, at Leicester Assizes, under sect. 2 of 46 Vict. c. 3, the Explosive Substances Act, 1883, for having on November 5th, 1910, unlawfully caused, by an explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, and was sentenced by Channell J. to four months' imprisonment with hard labour.

The Lord Chief Justice: Our attention has been drawn to the fact that it does not appear from the shorthand notes that the Attorney-General had given his consent to the proceedings as required by s. 7 of the Act.

Disney, for the Crown: Neither I nor counsel for the prisoner were supplied with any information on the point, but I have to-day ascertained that the consent of the Attorney-General was, in fact, not obtained. According to *Waller*, (1910) 1 K. B. 364; 3 Cr. App. R. 213; 74 J. P. 81; 79 L. J. K. B. 184; 102 L. T. 400; 26 T. L. R. 142, the consent of the Director of Public Prosecutions, required by s. 10 of the Prevention of Crime Act, 1908, is presumed, in the absence of any objection by the defendant that no such consent was in fact given, and by analogy the judge at the trial had a right to presume that the necessary consent of the Attorney-General had been given. The appellant never raised this point at the trial, and never raised it in the present appeal, and it ought not to prevail now having regard to the proviso to sub-s. 1 of s. 4 of the Criminal Appeal Act, 1907. No substantial miscarriage of justice has occurred. On the same facts the appel-

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lant could not have been indicted under s. 51 of 24 & 25 Vict. c. 97, the Malicious Damage Act, 1861, as damage was only done to an amount of about two shillings.

Bodkin, as *amicus curiæ*, referred to *Fuidge*, L. & C. C. C. 390; 33 L. J. M. C. 74 (1864), which decided that the provisions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed. The preferring of an indictment is a "further proceeding" within s. 7, sub-s. 1 of the Explosive Substances Act, 1883. With regard to the proof of the consent of the Attorney-General, the *fiat* is produced, but it is not customary to prove the handwriting of the Attorney-General by his official clerk or other witness unless the signature is challenged by the defendant.

The Lord Chief Justice: We have not considered in any way the merits of the case, but we give our decision simply on the point that in fact the necessary consent of the Attorney-General had not been obtained. This consent had to be given under s. 7, sub-s. 1 of the Explosive Substances Act, 1883, before any further proceeding beyond securing his safe custody could be taken against the appellant. The prisoner was not charged with malicious injury to property, but with an offence under s. 2 of the Act, the maximum penalty for which is penal servitude for life. It is true that the appellant has not taken this point, but if we did not give effect to it to-day we should simply adjourn the case, inform the prisoner of the objection, and allow him to raise the point when next the case came on for hearing. It is desirable, therefore, to consider this objection now, and we are of opinion that the absence of the consent of the Attorney-General takes away the jurisdiction of the Court. There is nothing here analogous to the case of *Waller:* in that case it was not proved or suggested that the consent of the Director of Public Prosecutions had not been given. The old practice was that the Attorney-General's clerk went down to the Assizes to prove his signature to the *fiat*. The consent of the Attorney-General was never taken for granted, but I do not say that it is now necessary on every occasion to give formal proof of the Attorney-

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General's signature. The case of *Fuidge* shews that the Court had no jurisdiction, and the conviction must accordingly be quashed.

This is not a matter with which we can deal under the proviso of sub-s. 1 of s. 4 of the Criminal Appeal Act, 1907. That section does not apply to cases where the Court had no jurisdiction over the prisoner. The appellant must be discharged.

Conviction quashed.

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY AND MR. JUSTICE PICKFORD.

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Lawrence Rappolt.

LAWRENCE RAPPOLT.

An attack on the general veracity of the prosecutor is a sufficient "imputation" within s. 1 (*f*) (*ii*) *of the Criminal Evidence Act*, 1898, *to justify cross-examination as to previous conviction.*

Applicant was convicted at the Central Criminal Court on March 3rd before Mr. Justice Darling for causing grievous bodily harm to Alfred Stevens on February 21st. The evidence was that Alfred Stevens was a witness for the prosecution in a murder case, and was assaulted by applicant and others. Applicant gave evidence, and in cross-examination was asked whether Alfred Stevens was honest, and in reply described him as "a horrible liar." Later in the cross-examination he was asked about his previous convictions.

Applicant asked for leave to appeal against conviction and sentence, leave having been refused by Phillimore J.

Cassels applied for an extension of time in order that an appeal on a point of law might be made. He contended that prisoner had called prosecutor "a horrible liar" in answer to questions in cross-examination. He referred to *Jones*, 74 J. P. 30; 26 T. L. R. 59; 3 Cr. App. R. 67 (1909); and *Grout*, 74 J.P. 30; 26 T.L.R. 60; 3 Cr. App. R. 64 (1909). The case for the defence was that Stevens had insulted Rappolt's wife, and that the alleged assault was the outcome of that. That was not a sufficient attack outside the evidence in the case to justify questions in cross-examination as to previous convictions within the meaning of s. 1 of the Criminal Evidence

Act, 1898. Counsel referred to *Bridgwater*, (1905) 1 K. B. at 134; 21 T. L. R. 69; 74 L. J. K. B. 35; 21 Cox C. C. 737; 91 L. T. 938; 69 J. P. 26; C. C. R.; and *Preston*, (1909) 2 Cr. App. R. 24; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280.

RIDLEY J.: Apart from the attack on the character of Stevens by the reference to a supposed insult by Stevens to the prisoner's wife, there was a general attack on the character of Stevens when the applicant stated on oath that Stevens was "a horrible liar." The questions asked in cross-examination and the answers given were:—

Q. Stevens has been a friend of yours for some years?—*A.* For some years I have been to him.

Q. An honest man?—*A.* Who?

Q. Stevens.—*A.* Well, I do not know about honest; I cannot see that there is much honesty about it.

Q. Has he ever been convicted?—*A.* Not as I am aware of.

Q. An honest man as far as you are aware?—*A.* Yes.

Q. And a truthful one?—*A.* Truthful? I cannot say that.

Q. As far as you are aware?—*A.* I think his brother won't speak to him because he is a horrible liar, so I cannot say he is truthful, can I?

That is an attack on the general character of the prosecutor, and goes far beyond anything that this Court has allowed to pass without rendering the accused liable to cross-examination. The application for an extension of time must be refused.

Application refused.

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Solicitor for Applicant—*J. Sykes.*

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Henry Williams.

HENRY WILLIAMS.

When the ground of an application for extension of time for leave to appeal is that the applicant believed that his interests were in other hands, the Court will not entertain the application when there has been undue delay.

This was an appeal from an order of Phillimore J. refusing the appellant an extension of time for (a) leave to appeal against conviction and sentence, and (b) legal aid, and there was also an application for leave to call further evidence. Sentence of five years' penal servitude for larceny in a dwelling-house had been passed by the Recorder at the Central Criminal Court, on June 8th, 1910.

Appellant was not present.

The Lord Chief Justice: The prisoner was convicted as long ago as June 8th, 1910, with another man, George Lane, before the Recorder at the Central Criminal Court on the charge of stealing a considerable quantity of jewellery, value about £120, in a dwelling-house. At the trial he gave evidence on his own behalf and also called witnesses. He was found guilty, and, numerous previous convictions having been proved against him, he was sentenced to five years' penal servitude; this sentence was ordered to run concurrently with another of twelve months' hard labour under the Prevention of Crimes Act, which was passed on him on May 11th, 1910. After waiting for over six months, he now applies for an extension of time for leave to appeal against conviction and sentence, and the only reason he offers for his delay is that he thought his friends had taken up his case and were doing all that was necessary on his behalf. It is possible that if special circumstances are brought to our notice we may accept such a reason as this as an excuse for a delay of a few days, or even of a week or two, but it must be understood that we cannot accept this excuse as a sufficient explanation for a delay of over six months. Such a long delay as this could be excused, if at all, only in very exceptional circumstances.

Application dismissed.

S. M.

STINIE MORRISON.

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Murder—Circumstantial evidence.

When the defendant is a witness, he ought to be called before other witnesses for the defence (if any).

This was (1) an appeal against conviction on points of law, (2) an application for leave to appeal against conviction on fact, and (3) an application for leave to call further evidence. Appellant was convicted of murder at the Central Criminal Court on March 15th, after a trial lasting nine days, and was sentenced to death by Darling J.

Abinger (with him *Turrell*): The murder of Louis Béron took place on Clapham Common in the early morning of January 1st, 1911. The body was found by a police constable under a clump of bushes—it had been dragged for some ten or more feet, face downwards, and then had been turned over on its back, and a handkerchief was tied so as to conceal the head. The inquest was held on January 5th, on January 6th a police notice was circulated about the discovery of the body, and on January 8th appellant was arrested when he was having his breakfast at a restaurant in Whitechapel. On January 9th, at 3.25, appellant was placed in the dock at the police court and photographed, and his portrait was published in the 6.30 edition of the *Evening News* of that day. The case for the Crown was that appellant was an intimate acquaintance of the murdered man, that on December 31st he left Snelwar's restaurant about 11.45 p.m. in the company of Louis Béron, that they walked about Whitechapel together until 2 a.m. or thereabouts, that they then were driven in a cab to Clapham Common, that they then walked from a point opposite the police station at Lavender Gardens to the spot where the murder was committed, that the murderer then walked to Clapham Cross, where he entered a cab, and the cabman Stevens drove him to the "Hanover Arms," Kennington Road, and that about 3.30 a.m. he was driven thence to a spot in Seven Sisters Road, on the way to Tottenham. There is no indication by the Crown as to the means by which Morrison, if he was the murderer, got back to Whitechapel without being seen by anyone.

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One of the strong points made by the Crown was that appellant, who was in fact arrested for failing to report himself while a convict on licence, instead of waiting to hear the charge against him, denied that he was guilty of murder before any charge of murder was mentioned by the police officers. According to the Crown, "he evolved the charge of murder out of his own inner consciousness." Such an argument as this ought not to have been used by the prosecution, as the defence could not dispute it or deal with it in any way except by letting in evidence of the last sentence of penal servitude against appellant. This was made a vital point by the prosecution—no less than nine witnesses were called to deal with this one issue, and it was not possible for him, defending, to cross-examine any of these officers without running the risk of letting in evidence of the appellant's previous convictions. He could not ask, If not for murder, what did you arrest him for? It was not until March 15th, the day on which the verdict was given, that he was able to call P.-C. Greaves and prove that appellant was informed at the police station that he was arrested on a charge of murder. After this evidence was given, it is true that Darling J. told the jury that the point was not of material importance, and counsel for the Crown asked the jury not to pay any attention to it; but it was too late then, the mischief had been done. The prisoner had been convicted not in consequence of the facts proved against him, but in consequence of his character and his previous convictions. So much prejudice was introduced into the case that the minds of the jury were warped and rendered incapable of appreciating the facts as proved. If a prisoner, when arrested, says to the officer, "The last time you arrested me I got five years," such a statement ought not to be given in evidence against him. It does not in any way prove his guilt in respect of the new charge on which he is arrested.

Prosecuting counsel laid too much stress on the incident of appellant saying to the police officer who arrested him, "Don't put anything in my pocket," and the observation of the police officer when arresting appellant, "Stein, I want you." He intended the jury to infer from this that appellant had been in the custody of the police before. Counsel for the Crown must abstain from opening such points as these, as by doing so he necessarily embarrasses the defence. Neither of these statements should have

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been given in evidence by the police officers at all, as they appear to be in contravention of the principles laid down in the Criminal Evidence Act, 1898. It was wrong of counsel for the Crown to press on the jury that it was an extremely suspicious fact, a central fact in the case, that the appellant, although he knew of the murder of his friend Béron, did not in any way communicate with the police. Was it right for him to make such a suggestion when he knew that if appellant had shown himself to the police he would have been arrested for failing to report himself, and detained to serve the rest of his sentence? It was impossible for appellant's counsel to deal with such a suggestion without shewing that appellant was a convict on licence. Again, the defence was greatly embarrassed by the action of the learned judge during the cross-examination of the waiter Mintz. With the view of shewing that this witness's memory could not be relied upon, he was asked whether he had not attempted suicide, and whether he had not been an inmate of Colney Hatch Asylum as late as October, 1910, but Darling J. had interrupted these questions by cautioning appellant's counsel, and pointing out that he was attacking the witness and accusing him of a criminal offence, and referred to the Criminal Evidence Act in such a way that the jury must have known that the prisoner was previously convicted. The cross-examination was in fact directed towards shewing Mintz was mentally incapable of giving reliable evidence. From that moment the trial became abortive.

He also complained that early in the case he was forced against his wish to put in evidence a photograph, shewing the injuries on the deceased man's head, produced at the police court, which the Crown refused to put in at the trial, although the photograph was taken by the police and used at the inquest. This photograph was useful to the defence as negativing the theory that robbery and not vengeance was the motive of the murder, and thereby deprived him of the right to the last word. He complained of the question put by Darling J. to Dr. Freyberger whether the injuries on the deceased could have been caused by a jemmy. This was an intimation to the jury that the prisoner was a burglar. The jury ought to have been directed that, having regard to the admitted perjury on the part of some of the witnesses for the prosecution who were called at the police court, it would be unsafe for them to convict the prisoner on evidence

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coming from a similar source. No less than six witnesses in the case had either confessed they had committed perjury or had accused each other of perjury. He submitted that, having regard to the way this case was conducted by the prosecution, the incautious reference by the judge to the jemmy, his unfortunate language as to the possible consequence of cross-examination of the witness Mintz, the perjury of the witnesses, and the conspiracy to suborn perjury, it was not fair or just for the appellant to be cross-examined as to his previous convictions, especially as the appellant was being tried on a felony punishable with death. He relied on the Act 7 & 8 Geo. IV. c. 28, s. 11, as modified by 6 & 7 Will. IV. c. 111, which had never been in form repealed. This Act allowed a prosecutor, when an offender who had been previously convicted of felony gave evidence of his own good character, to prove the previous convictions of the offender, if and only if the charge in respect of which the offender was then on his trial was not a felony punishable with death. Where the crime with which the prisoner is charged is punishable with death, the prisoner never has been, and is not now, liable to cross-examination as to previous offences.

Not only was the appellant cross-examined about his own character and his previous convictions, but upon charges brought against and suspicions entertained concerning persons he happened to know. Surely this went too far. See *Bate* (*widow*) v. *Hill*, 1 C. & P. 100 (1823). Mr. Muir, for the Crown, ought not to have cross-examined the appellant as to the statements made by appellant in his petition to the Home Secretary asking for a remission of sentence whilst undergoing a term of penal servitude in respect of some former conviction, nor as to the reason why appellant had not given evidence at the proceedings in the police court, nor as to appellant's immoral relations with women. No sufficient proof was given that the deceased was a man of means, or that he had on him money and jewellery worth anything near the value placed on them by the Crown.

The dangers of relying on circumstantial evidence, as set forth in Taylor on Evidence, pp. 74 and 75 of the 2nd ed., paras. 59 and 60 (10th ed., pp. 71 and 72, paras. 68 and 69), apply with full force to the evidence in this case. "Experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses respecting dates, footprints, handwriting,

admissions, loose conversations, and questions of identity. . . . Besides it must be remembered that, in a case of circumstantial evidence, the facts are collected by *degrees*. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and with professional zeal ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. . . . Innocent actions may thus be misinterpreted—innocent words misunderstood: and, as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions. We do not say that this is frequently the case, nor do we intend to disparage the police. The feelings by which they are actuated are common to counsel, engineers, surveyors, medical men, antiquarians and philosophers; indeed to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth.

But, admitting that the facts sworn to are satisfactorily proved, a further and highly difficult duty still remains for the jury to perform. They must decide not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion: for it is only on this last hypothesis that they can safely convict the accused."

The evidence as to identity of the prisoner with the alleged murderer is extremely weak and absolutely unreliable, but before elaborating that part of the case he would like to call further evidence to show (1) that the brown paper parcel left at Snelwar's restaurant might have contained a flute, but could not have contained an iron bar (as Mintz had suggested), and (2) that the appellant slept at 172, Fieldgate Mansions, on Monday, January 2nd, and Tuesday, January 3rd. The reason why the evidence as to the contents of the parcel was not brought forward at the trial was that appellant's solicitors were prevented from interviewing Becky Snelwar owing to the hostile attitude taken up by Solomon Béron, but recently new solicitors had been appointed for the appellant, and they had managed to obtain a proof of her evidence. The evidence of Becky Snelwar was vital to appellant's case, and its effect was stated in the written instructions given by the appellant to his solicitors while he was under remand at the police court.

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R. D. Muir, for the Crown, had seen the outline of the evidence the proposed witnesses were supposed to be able to give the statement of Becky Snelwar would be quite inconsistent with what appellant had sworn at the trial and suggested at the police court. The evidence of the other two witnesses was of no value, as the point on which his cross-examination turned was whether Morrison was staying in Fieldgate Mansions in his own name or not.

The LORD CHIEF JUSTICE: Without offering an opinion as to whether the proposed evidence is material or not, and without deciding that any good reason had been shown why leave should be given to call Becky Snelwar, the Court thinks it better to allow the evidence to be called.

Becky Snelwar, Esther Blumenstein, and Sarah Keenan were then called, and Inspectors Ward and Wensley were recalled and examined: they were all cross-examined.

[The Court ultimately held that their evidence did not assist appellant's case in any material respect.]

Abinger then proceeded to argue that the evidence given by the three cabmen—one who said that he drove appellant from Whitechapel to Clapham, and two who drove him from Clapham and from Kennington respectively—as to the times of their taking up and setting down their fares was most unreliable, and the jury ought to have been directed not to accept it—the evidence had been varied from time to time in order to fit in with further facts that came to the knowledge of the witnesses. On the state of facts most favourable to the theory of the Crown, not more than twelve and a half minutes was allowed for the murderer to commit the murder, mutilate the body, drag it some distance, and then walk to Clapham Cross.

What was the motive for the crime? Robbery was suggested by the prosecution, but did that motive explain the extraordinary mutilation of the murdered man's face? Was not revenge the much more probable motive? This part of the defence was not placed adequately before the jury by the learned judge, nor did he point out what little evidence there was that the deceased was wearing jewellery of any value, or had, or was supposed by the

appellant to have, in his pockets money of any considerable amount.

The judge ought to have laid greater stress on the evidence of the appellant and his witnesses, as shewing where he was on the night of the murder and afterwards. This, he submitted, proved a complete *alibi*.

[The LORD CHIEF JUSTICE: How was it that you called these witnesses before you called the prisoner?]

If prosecuting counsel can call his witnesses in any order he prefers, so also can the counsel for the defence. Before calling the appellant I wished to know myself what these witnesses had to say.

[The LORD CHIEF JUSTICE: In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call.]

He also complained that the lady who found a blood-stained handkerchief near the scene of the murder, but further south, was not called as a witness by the Crown: she was called by the defence. This ought to have been more fully investigated by the Crown. He suggested that the murderer, instead of going to London *viâ* Clapham North, went to London *viâ* Clapham South, in which case the evidence that Stevens carried the murderer was destroyed.

With regard to the summing up of Darling J., he did not complain of any specific misdirection, but he complained of the absence of direction on most important parts of the evidence. In a trial that lasted nine days the judge's summing up took only three-quarters of an hour. It was impossible in that time to give the jury the guidance which was necessary, and which they had a right to expect, especially after the inflammatory speech of Mr. Muir, a speech which he submitted in many instances dealt with the evidence and inferences to be drawn from it in a way quite at variance with the traditional moderation and impartiality of a Crown prosecution.

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R. D. Muir and *Leycester*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: This appeal has been argued by Mr. Abinger for two and a half days with great ability, and we have followed him with the closest attention and carefully considered every point he has raised. But this appeal has proceeded in a way which entirely overlooks the functions of this Court. Mr. Abinger has urged here the same arguments as he addressed to the jury; he asks us, as he asked the jury, to disregard certain evidence and distrust certain witnesses, and to give effect to the evidence in favour of the appellant. This is a mistake that is very commonly made. The duty of this Court is laid down in s. 4 (1) of the Criminal Appeal Act. We must allow the appeal if we "think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence," or that the judgment of Darling J. "should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case" we must dismiss the appeal.

Mr. Abinger's argument was that on many grounds the verdict was unreasonable, and could not be supported, and consequently this appeal must be allowed. We have given anxious consideration to the case, and have examined the evidence most carefully, and since the opening of the appeal we have gone through the evidence again with the assistance of Mr. Abinger, who has materially helped us by directing our attention to the important questions and answers. What we have to satisfy ourselves about is that the evidence as to the association of the appellant with Beron before 2 o'clock on the morning of the murder, and the evidence that the appellant was the man who returned from Clapham Common that morning, was sufficient to justify the jury in coming to the verdict they have given. The jury were directed by the judge in the most distinct language that it was their duty to find the prisoner not guilty unless they were, upon the evidence adduced, absolutely satisfied of his guilt.

This case brings out in strong relief the evils which may be created, and which at times may lead to a miscarriage of justice, if the case is overladen with too many details. Those who con-

duct prosecutions should not raise comparatively unimportant issues which tend to lengthen proceedings and increase the difficulty of arriving at a correct conclusion. In a case of this kind there soon stand out one or more clear issues, which, if rightly decided, will be a safe guide to acquittal or conviction. Though when dealing with a defence one is inclined to shew more latitude, the same observation applies to those conducting a defence. These side issues tend to obscure and divert the minds of the jury from the real issue. Fortunately, Darling J. brought the jury back to the real issues in the case, and directed them most properly, otherwise this appeal would have been more difficult to deal with.

Much time had been occupied, and much evidence adduced as to what the appellant is supposed to have said when he was arrested. The Court are all of the same opinion as Darling J on this point. At the time of the arrest there was great feeling in London in consequence of certain outrages and murders which had recently taken place, and the appellant had admittedly been convicted more than once of serious crimes; it would therefore have been very unwise to draw any inference adverse to the accused from the fact, if it were a fact, that he was the first person to mention the word "murder" in referring to the crime for which he thought he was being arrested. We can easily imagine that a man to whom no suggestion of any kind had been made, and who did not know for what offence he was being arrested, but did know that these murders or this murder was a subject of public discussion, should say to the officer who arrested him, "Do you charge me with murder?" We think it was unfortunate that so much was made of that incident. It was an example of that class of minor issues which might be misunderstood by a jury and regarded as the vital issues of the case. What a man says at the time of arrest is evidence for him or against him, but it is one thing to prove what he said, and another thing to press words which may have a harmless meaning into a confession or admission of guilt. Darling J. effectively cautioned the jury that, whether established or not, it was quite a small matter, and Mr. Muir, in the fullest and most honourable manner, asked the jury to disregard altogether the suggestion and the evidence brought in support of it. The question for us now is, are we justified in disregarding the raising of this issue? We have con-

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sidered the matter and are thoroughly satisfied that the jury in considering their verdict were not in any way influenced by this incident.

We next come to the cross-examination of the appellant, a matter to which Mr. Abinger has devoted many hours' criticism, and we are bound to say that we can see no foundation for the argument he has addressed to us. He has said that from the moment of Mr. Muir's opening address, no alternative was left to him but to bring out the fact that Morrison was a convicted criminal. We are satisfied, no matter what Mr. Abinger may have thought, that there was nothing in Mr. Muir's opening that justified that view, and there was nothing done by Mr. Muir to force Mr. Abinger's hands or compel him to disclose the past career of his client. On the contrary, Mr. Abinger has practically admitted that, in the interests of his client and after consulting with him and obtaining his express consent, he made up his mind to cross-examine the witnesses quite apart from anything Mr. Muir did, and in spite of the consequences. It would have been more satisfactory if the case had been decided independently of any consideration of the appellant's past career, but when it became a question of conflict of testimony and credibility the course adopted by Mr. Abinger made it open to Mr. Muir to cross-examine the accused as he did. If Mr. Muir had said anything in a moment of forgetfulness he could and would have been corrected not only by the judge, but by appellant's counsel; nothing of that kind happened: it was the conduct of the defence, adopted as we now know after full consideration, that made it open to Mr. Muir to bring out the previous convictions of the appellant.

The matter first arises in the cross-examination of the waiter Mintz. It was possible for Mr. Abinger to have cross-examined only with the purpose of showing that his evidence could not be relied on owing to the defective state of his mind, and if Mr. Abinger's language had made it clear that he was making no other imputations against Mintz except that his memory could not be relied on, and his evidence therefore could not be trusted, he would have done nothing to expose his own client to the cross-examination which took place. But in this case there was some doubt as to the meaning and purport of his questions, and although we do not say that this cross-examination

would have justified cross examining the appellant as to character, we do not say it would not. It is not necessary to give, and we do not give, any decision on this point, but with regard to the cross-examination of Mrs. Deitsch (which suggested that she kept a disorderly house), there can be no doubt that this falls within the express terms of the Criminal Evidence Act, 1898, s. 1, sub-s. (*f*) (ii), and exposed the appellant to the risk of his past life being enquired into. It had become a question of credibility: who was to be believed when one contradicted the other? It was clear her evidence was very important, as, if it was true, it destroyed the prisoner's *alibi*, and she might have been effectively cross-examined as to her memory, her opportunity of seeing the appellant, and so forth. But Mr. Abinger was not content to do this, he made a violent attack on her character so as to discredit her evidence altogether, and he did it with his eyes open, and after consultation with his client. It is true he now suggests that he was forced into this course by Mr. Muir's method of conducting the prosecution, but we can see no ground for this suggestion, and no improper evidence has in fact been placed before the jury.

Mr. Abinger said if such evidence is admitted the prisoner will be tried on his reputation, not on the charge the subject of the trial. This is not a sound argument to address to a Court—the Act protects a person charged who elects to give evidence in the same way as he has always been protected except in certain events, and if the nature or conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution, the prisoner when called is liable to be cross-examined as to character It would not be right or just if it were otherwise, and there is no foundation for Mr. Abinger's complaint or for his suggestion that the verdict was unreasonable.

In the examination of Dr. Freyberger as to the kind of instrument that could have inflicted the injuries on the murdered man, Darling J. asked the witness whether they could have been inflicted by a jemmy. Mr. Abinger, with his knowledge of the prisoner's career, complains that this was an intimation to the jury that the jemmy was an article not unfamiliar to the appellant. We are assured by Darling J. that he asked the question simply by way of illustration, and we cannot see that

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at that stage of the case the question could have in any way prejudiced the prisoner.

We will now deal with the fresh evidence. The evidence of Mrs. Blumenstein and Mrs. Keenan was quite useless. Neither of them was sure as to the date of the appellant's lodging in Fieldgate Mansions, and neither of them knew the name of the man they had seen. The only object in calling them was to shew that the appellant was living under his own name and without any concealment, and their evidence completely failed to prove this. Now, as to the last of the comparatively unimportant incidents, the evidence of the little girl Becky Snelwar Mr. Abinger says her evidence proves that Mintz has committed perjury, because this little girl came yesterday to contradict him, but the appellant's own evidence entirely disagreed with hers. Inspector Ward, whose conduct throughout the case has been profusely praised by Mr. Abinger, and whose truthfulness has not been doubted, also contradicts her account. We are therefore unable to attach any importance to Becky Snelwar's evidence. This incident is probably more important than some of the other incidents in the case, as the parcel given to the waiter may have contained some instrument with which the deceased was attacked.

The real issue here was whether the jury were satisfied as to the appellant's identification. My brother Darling summed up this case in a way that could leave the jury no doubt as to what was their duty. He pointed out that the three cabmen, Hayman, Stevens and Castling, each swore that the appellant was the man in his cab. The appellant swore he was not; if he was there, and the cabmen had made no mistake as to his identity, it would be very difficult to understand why he was there unless he was engaged in or a party to the murder. The cab-drivers say they saw him at a time when he says he was in bed; Jack Taw, Zaltzman, Weisberg and Mrs. Deitsch say they saw him in the streets in Whitechapel when he says he was in bed. The jury must have been satisfied beyond reasonable doubt that the appellant was the man in those cabs—if they thought that the drivers might have made a mistake, or that there was any doubt, the prisoner was entitled to a verdict of not guilty. Darling J. further pointed out to the jury that, assuming that each of the cabmen was honest, and was certain in his own mind that the

prisoner was the man he carried, the jury must be satisfied that they were not making a mistake, an honest mistake no doubt, but nevertheless a mistake arising from the fact that before they picked out the prisoner at the police-station, they had had the means, if they had chosen to use it, from the descriptions and photographs in the newspapers, of knowing what was the personal description of the man they were going to identify. He expressly told the jury that they must acquit the prisoner unless they were satisfied "that these cabmen really took notice enough and had opportunity enough to be able some days afterwards to swear with certainty to the man they had driven and to swear with certainty that he was the man when they saw him again."

There is no dispute that L. Béron was at Snelwar's restaurant on the night of December 31st, and that he was murdered on Clapham Common about 3 a.m. on the next morning, and that his body was found about 8 a.m. It was for the jury to say whether they were satisfied as to the evidence that the appellant and L. Béron were together before they entered the cab, and it was for them to say whether or not they believed the cabmen. Mr. Abinger's arguments with regard to the alleged discrepancies of time were put before the jury, and it was in their power to accept or disregard them. People who speak about intervals of time are not always strictly accurate, they generally say, and in this case the cabmen said, *about* an hour, *about* a half hour, and so on, and even if the times are taken in the way most favourable to the prisoner, there is still left an interval sufficient for the murder to take place. With regard to the whole of the evidence, Darling J. directed the jury that if they had any reasonable doubt, they must decide in the prisoner's favour. If the prisoner had not been proved by strict evidence to be guilty, there was only one verdict an English jury could give, viz., not guilty. Unless they were all unanimous they could not find him guilty.

We entirely agree with the observations of Mr. Abinger as to the impropriety of publishing a photograph of a man in the newspapers simply because he is accused of a crime. It is a monstrous thing that his photograph should be taken in the dock in the early part of the proceedings, and then published broadcast. This was neither the time nor the place to consider who suffered the greater damage by the publication of photographs, the prosecu-

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tion or the accused, but if we thought that any of the jury had been misled, because the witnesses were in fact identifying a photograph when they were purporting to identify a man, we should not hesitate to allow this appeal.

But Mr. Abinger's criticisms with regard to identifying from photographs do not apply except possibly in one case. It is not true that all the witnesses waited until they had seen the photograph—more than one of them identified the appellant before the photograph was published, and it was for the jury to say whether they believed them. If Hayman was telling the truth and the jury believed him, it was the appellant who went to Clapham Common with the murdered man. The difficulty in prisoner's way was that if the identification was established there could be no innocent motive for the appellant going down to Clapham Common with Béron and returning without him. There was probably some one else in the murder besides the appellant, but no one knows all the incidents of the murder. With regard to the S marks on the murdered man's face, if any conclusion could be drawn from them it was a matter for the jury, and Darling J. at the trial left it to them. Whether the motive was robbery or vengeance made little difference, the all-important issue was the identification of the prisoner.

It is not possible for us to come to the conclusion that this verdict was unsatisfactory or unreasonable, or cannot be supported having regard to the evidence, or that there was a wrong decision of any question of law, or that there has been a miscarriage of justice. It is one of the cases which require and it has received the most anxious consideration, and if it were possible for us to come to the conclusion that the verdict was unsatisfactory, we should not have hesitated to say so. We are of opinion that there was ample evidence before the jury to justify the verdict, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Claude Lumley & Co.* and *Alfred A. Robinson.*

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE COLERIDGE.

KURT HUESSENER AND JOHN SCHROEDER.

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Kurt Huessener and John Schroeder.

Severity of sentence under the Prevention of Corruption Act, 1906.

These were appeals from orders of Mr. Justice Phillimore refusing leave to appeal against conviction and sentence, and applications for extension of time in which to appeal against conviction on points of law.

The applicants were convicted at the Newcastle Assizes on February 20th, 1911, on four charges of corruption under 6 Edw. 7, c. 34, the Prevention of Corruption Act, and were sentenced by Horridge J. on February 27th, 1911, Huessener to four concurrent terms of six months', and Schroeder to four concurrent terms of four months' imprisonment with hard labour.

R. D. Muir (with him *R. I. Simey*), for both the applicants. The applicants and a man named Ward were found guilty on three charges:

(1) Of giving 2*s.* on September 22nd, 1910, to Joseph Weatherall, a servant of the Thermal Syndicate, Ltd., as an inducement for him to disclose the method of manufacturing silica employed by his principals, and the names of the persons supplying moulds to his principals.

(2) Of giving 5*s.* on September 23rd, 1910, to the said Joseph Weatherall, for the same corrupt purpose.

(3) Of offering employment to the said Joseph Weatherall on September 23rd, 1910, for the same corrupt purpose.

And the applicants were further convicted, but Ward was acquitted, on a fourth charge of corruptly offering employment

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to Ralph Walton, an agent of the Thermal Syndicate, in order to induce him to disclose the method of manufacturing silica employed by his principals.

There was no evidence against the applicants on the fourth count of the indictment, and the judge ought to have withdrawn the case from the jury. He adopted that course with regard to the defendant Ward, and ought to have done the same with regard to the applicants.

The learned judge also misdirected the jury (1) in telling them that the defendants were charged with asking Weatherall what the shapes were made of, and who was the coil man in the works, and (2) in telling them that the question was whether the defendants wanted to get the alleged secret processes relating to the finishing of the articles.

There was nothing illegal on the part of the applicants in their trying to obtain competent servants such as Weatherall or Ward for their own works, and there would be nothing illegal on the part of the applicants, after Weatherall and Ward had entered their service, in asking them the names of the persons who supplied moulds to the Thermal Syndicate, or enquiring as to the method of manufacturing silica employed by the syndicate.

The sentences were too severe. Both applicants have hitherto been men of irreproachable character—Huessener is a man well known in the engineering world, managing director of Silicaware, Ltd., a member of the Iron and Steel Institute, and of the South Wales Institute of Engineers, and connected with many engineering companies on the continent. Schroeder had no pecuniary interest whatever in the transaction; he was merely a friend of Huessener. The alleged bribes were only 2*s*. and 5*s*., amounts too insignificant to be regarded as bribes.

The Lord Chief Justice: We have listened with the greatest attention to Mr. Muir's arguments, but they have not been able to change the opinion formed by the Court on a very careful perusal of the evidence and documents before us. The case was in the paper a fortnight ago, when the Court was differently constituted, and as we had no reason to expect that any counsel would appear on the application, each of us, after giving the matter the fullest consideration, came to the conclusion that there was no ground to interfere with the decision of Mr. Justice

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Phillimore. Two more judges have considered the case to-day, and the Court is unanimous in thinking that this application must be dismissed.

Charges of this kind require the most careful consideration, and as a rule are extremely difficult to prove, and direct evidence is not often obtainable. In this case it was most essential that there should be no confusion in the minds of the jury between *bonâ fide* legitimate attempts to obtain suitable servants, and illegal acts of bribery and corruption. Mr. Justice Horridge directed the jury quite correctly on the law; he told them they could not convict if the alleged bribes were given simply to induce the men to leave their present employment and enter the service of the applicant Huessener or his company, Silicaware, Limited, who were rivals of the Thermal Syndicate, Limited, but they must convict if they were satisfied that the bribes were given to induce the men to disclose their masters' secret methods of manufacturing silica, and the names of the persons supplying moulds to them. He also pointed out, and quite correctly, that if the jury were satisfied that the bribes were given for the above-mentioned purpose, they were bound to convict, even if they were also satisfied that the applicants wished in addition to secure the services of these men for their company at Zurich.

Mr. Muir suggests that the jury were not sufficiently put on their guard as to the necessity of distinguishing between acts which constituted illegal conduct on the part of the applicants, and acts which, though shabby and underhand, and perhaps unscrupulous, are not illegal. We do not consider this suggestion or complaint well founded. We are of opinion that on the facts proved before the jury there was ample evidence on which they could find the applicants guilty, there was ample evidence that in addition to a real or colourable attempt to entice away servants, bribes were being given to servants for the purpose of inducing them to supply information, and give away the secrets of their masters with regard to (1) their method of manufacturing silica, and (2) the names of the persons who supplied them with moulds. The jury had to look at all the facts proved before them. It was admitted that the two companies were rivals in business, and that there was some secret in the manufacture of silica by the English company. The applicants approach first one and then another of the workmen of the

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Thermal Syndicate, Ltd., a sum of 2*s.* is given on one day and a sum of 5*s.* on the next day, and these gifts are followed up by a tempting offer of employment. Evidence was given which, if believed, proved that the applicants asked the workmen for the information alleged in the indictment. It was a matter for the jury to decide—they have decided, and we cannot interfere, and the application for leave to appeal against the convictions will be dismissed.

We cannot see any misdirection in the summing up. In the original notice of appeal there was no allegation of misdirection, and the arguments adduced to-day on this head appear to us hypercritical and without any real substance.

The only other matter to be considered is, are the sentences excessive? We quite agree with Mr. Muir that for men who have hitherto carried on inoffensive, innocent lives, six months' and four months' imprisonment with hard labour are heavy punishments, but when a case of this kind is proved a judge is at liberty, we will not say bound, to take a serious view of it. As we have said before, it is not often that a case of this kind can be proved; a large number of these offences remain undetected. Before the prosecution can be started it is necessary to obtain the consent of the Attorney-General or Solicitor-General, and there are always great difficulties in proving the offences alleged. Mr. Muir also urges that the bribes received were the paltry sums of 2*s.* and 3*s.*, and no more, but it must be remembered that they were paid on successive days, and were followed up by tempting offers of employment at largely increased salaries, and the evidence was that there were promises of more to come. This was the beginning of a series of attempts by one manufacturer to obtain the trade secrets of a rival manufacturer by bribing the servants of the latter. It is impossible for us to say that the offences proved were only slight or trivial, or that in awarding these punishments our brother Horridge erred on any principle of law; it was eminently a matter for his discretion.

The sentences will run from the date of conviction.

Applications dismissed.

Solicitors for Applicants—*Robinson and Bradley,* for *Edward Clark,* Newcastle.

S. M.

JAMES BIRTLES.

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A properly proved certificate of marriage between a woman and a person of the same name as the accused, coupled with proof that the latter had spoken of the former as his wife, is sufficient evidence of the identity of the latter to go to the jury on a trial for bigamy.

This was an appeal against conviction on a point of law. Appellant was convicted of bigamy at Leeds Assizes on March 18th, 1911, and was sentenced by Horridge J. to twelve months' imprisonment with hard labour.

L. G. Hoare for appellant (under s. 10 of the Criminal Appeal Act), who was not present. The judge ought not to have left the case to the jury. There was no evidence whatever of identity. There must be proof of the actual marriage. Evidence of reputation of the marriage is inadmissible. *Thomas Simpson,* 15 Cox C. C. 323 (1883). Production of the certificate of marriage without further proof of the names certified in it is not enough. Horridge J. was wrong in directing the jury that they could, if they liked, from the certificate and from the evidence of cohabitation, from either or both of them together, infer that the prisoner was the man who married Ann Reed in October, 1882. Counsel also referred to *Lindsay,* 66 J. P. 505; 18 T. L. R. 761 (1902); *Willshire,* 6 Q. B. D. 366; 50 L. J. M. C. 57; 44 L. T. 222; 29 W. R. 473; 14 Cox C. C. 541; 45 J. P. 375; C. C. R. (1880); *Wilson,* 3 F. & F. 119 (1862); *Morris* v. *Miller,* 4 Burrows, 2057 (1767); *Savage,* 13 Cox C. C. 178 (1876); *Hubbard* v. *Lees and Purden,* L. R. 1 Exch. 255; 4 H. & C. 418; 35 L. J. Ex. 169; 12 Jur. N. S. 435; 14 L. T. 442; 14 W. R. 694 (1866).

The case was not left properly to the jury by the learned judge. He did not actually rule that production of the certificate was proof of the identity of the parties mentioned in it, but he went very near to it. He also said he was not at all satisfied that the law now was as stated in some old text books, that in cases of bigamy every element of the marriage must be proved strictly; on the contrary, his view was that in some circumstances evidence of reputation, cohabitation, or acknowledgment

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might be sufficient proof of the marriage and of the identity of the person to establish a charge of bigamy.

Perks, for the Crown, was not called upon.

Lord Coleridge J.: The question here is whether the learned judge was wrong in leaving the case to the jury. At the trial a certificate was produced of the marriage of Ann Reed with a man of the same name as the appellant. That would not prove that the defendant was the man so married. There was also evidence that the appellant had spoken of Ann Reed as his wife. This again by itself would not have been sufficient proof of identity, but the two facts together are some proof of the connection or identification of the prisoner with the person mentioned in the marriage certificate. We are unable to see that Horridge J. made any mistake on the law, or that he misdirected the jury in any way. The appeal must be dismissed, but the sentence will run from the date of conviction.

Appeal dismissed.

S. M.

Alfred Bendon.

ALFRED BENDON.

The Court will quash a part of a sentence that the convicting Court had no jurisdiction to impose.

This was an appeal against a sentence of two years' police supervision, referred to the Court by the Home Secretary.

Appellant was convicted on January 7th, 1910, at the Hereford City Sessions by the Recorder for obtaining money and clothing by false pretences, and was sentenced to imprisonment with hard labour for eighteen months, to be followed by two years' police supervision. On March 23rd, 1911, he petitioned the Home Secretary for the remission of the sentence of police supervision on the ground of his previous good character both in civil and military life, and on the ground that he had never been convicted before.

The appellant was not present.

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H. G. Farrant for the Crown. It is true that no previous conviction for a crime was proved against the appellant at Hereford as required by sect. 8 of 34 & 35 Vict. c. 112, the Prevention of Crimes Act, 1871, and the sentence of police supervision cannot, therefore, be supported. The appellant was released from prison on April 4th last.

The Lord Chief Justice: This appeal must be allowed. The sentence of imprisonment for eighteen months with hard labour will stand, but the sentence of two years' police supervision will be quashed.

Sentence of police supervision quashed.

S. M.

SAMUEL WINKWORTH.

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Samuel Winkworth.

Where, on fresh evidence, the Court was satisfied that the case set up by the prosecution at the trial failed, though an alternative case withdrawn from the jury at the trial might have succeeded, the conviction was quashed.

This was (1) an appeal against conviction by leave of Horridge J., and (2) an application for leave to appeal against sentence.

Appellant was found guilty on March 14, 1911, at the Cardiff Assizes of attempting to obtain money by false pretences, and was sentenced by Lush J. to six months' imprisonment with hard labour, subsequently altered to six months' imprisonment without hard labour.

The false pretence alleged was that the appellant had written his own number (176) on a truck of coal loaded by one Trevethin, and by that means had attempted to obtain payment for the truck of coal as if it had been worked by him.

The appeal was heard on April 10th, when it was argued on behalf of the appellant that the facts as proved by the prosecution at the trial made it impossible for the appellant to have had access to the tram in order to mark it, and that therefore the verdict was one which could not be supported, having regard to the evidence. After being argued at some length on behalf of appellant, and also on behalf of the Crown, it was

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adjourned by the Court until May 1st in order that further evidence might be called to clear up some doubtful points in the depositions, and in particular to shew (1) what happened to Trevethin's tram between two o'clock on a Friday afternoon and 6 o'clock on the Saturday morning, (2) what time it was taken away from the stall, and (3) what time it arrived at the pit-head.

At the adjourned hearing on May 1st, William Norman Thomas, the employer's weighman, John Daniel Parry, the night overman at the colliery, and William Foster, a fireman in charge of the district in which the appellant was working, were called by the Crown and cross-examined on behalf of the appellant. None of these witnesses had been called at the trial, and their evidence made it clear that the substitution of appellant's number on the tram for Trevethin's was not made while the tram was below, but while it was at the pit-head.

E. J. B. Herbert, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The witness Hill, when cross-examined by the appellant, said that it was not possible for any man to mark a tram of coal in its transit from the top of the pit to the weighing machine without being seen by one of the men. When the same question was put to the next witness Trevethin, Lush J. told appellant that he already had an answer in his favour that it was not possible. The judge, however, put the question to Trevethin, who confirmed the answer of Hill. The only case made against appellant at the trial was a suggestion that the appellant altered Trevethin's number by putting his own number on top while the trams were below ground, and while they were being got together with a view to being taken up. This was the only case made against the appellant, and no sufficient evidence was called to establish it. The witnesses called to-day ought to have been called at the trial by the Crown, and these witnesses conclusively prove that the alteration of the number did not take place down below. Appellant's case had always been that he had nothing to do with the alteration of the number, but that some enemy had substituted his number and rubbed out Trevethin's in order to get him into trouble because he was not a member of the Federation.

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Hugh Jones for the Crown. There was ample evidence before the jury on which they could convict. The case for the Crown was that appellant rubbed out Trevethin's number and substituted his own in order to claim payment of money which was really due to Trevethin. It was not necessary for the Crown to prove when the alteration was made, provided they satisfied the jury that it was made by appellant, and with a fraudulent intent.

The LORD CHIEF JUSTICE: This case is another instance of the difficulty occasioned by our not having the power to order a new trial. There was a strong *primâ facie* against the appellant: there was evidence that he was claiming for more trams than were due to him, but still there was some uncertainty as to what was the real case presented by the prosecution against him, and had the judge left the case to the jury in a more general way we should have felt more difficulty in disposing of this appeal. But from the summing up of Lush J. it is clear that the case for the Crown was that the tram was left by Trevethin in such a place on the Friday that it could have been altered down below on the Friday. The jury were without satisfactory evidence as to the time when or place where the appellant could have made the alteration. The appellant's stall was separated from Trevethin's stall by about a mile. The evidence called this morning puts it beyond doubt that the alteration was made at the pit-head, and not when the tram was underground. It is possible that the theory that the number had been altered purposely by an enemy was true, and therefore it is impossible to dismiss the appeal on the ground that no substantial miscarriage of justice has occurred.

The case put by Lush J. to the jury was that the alteration did not take place above ground, but below. After the evidence was given by Hill that it was impossible for any man to mark a tram of coal in its transit from the top of the pit to the weighing machine without being seen, he stopped the prisoner, who was not defended by counsel, from cross-examining the other witnesses on the point, and told the jury that the suggestion of the prosecution was that the appellant rubbed out Trevethin's number on the tram and substituted his own while the trams were collected together underground, and while they were being got together with a view to being taken up. It was too late now for the prose-

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cution to shift their ground and say that he had ample opportunity to alter the number on Trevethin's tram on the Saturday morning when it was at the pit-head. According to the evidence given to-day there were more than a hundred trucks standing above ground, end to end, on the Saturday morning, and it was possible for the appellant to have altered the marks on the sides of one of the trams though not at the ends, and the evidence given at the trial was that Trevethin's number was rubbed out and the appellant's number substituted at the sides, but not at the ends. The learned judge practically withdrew from the jury the consideration of the alteration in the number having been made above ground. During the whole of the summing up there is no reference to such a possibility. We cannot order a new trial, and we do not express any opinion as to what the truth of the matter is. We do not say that there were not suspicious circumstances affecting the appellant, but we do say that the evidence adduced at the trial was not satisfactory or sufficient to establish the case set up by the Crown, and we are of opinion that the conviction must be quashed and the appeal allowed.

Conviction quashed.

Solicitors for the Appellant—*J. Westcott & Sons.*

S. M.

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1 *May.*
Arthur
Pavitt.

ARTHUR PAVITT.

The Court will quash a conviction under s. 7 (3) of 34 & 35 Vict. c. 112, the Prevention of Crimes Act, 1871, which is not supported by positive evidence but is founded on mere suspicion.

This was an appeal by leave of the full Court, granted on April 10th, 1911, against conviction and sentence, and an application for leave to call further evidence.

The appellant was convicted on February 23rd, 1911, at the County of London Sessions, of an offence under the Prevention of Crimes Act, 1871, s. 7 (3), and was sentenced by the Deputy-Chairman to nine months' imprisonment with hard labour.

Gathorne Hardy for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence against the

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appellant was that he was watched by two police officers who were together. They saw him enter the garden gate of No. 2, Holmbush Road, and stay there about two minutes; then he entered the front garden of 44, Rusholme Road, and remained out of sight for two minutes; he came out and went to the side entrance of No. 46 into the area behind the side gate, then he came out, closing the side gate behind him. He was stopped by the police officers, who were in private clothes, and in reply to their questions, said he was trying to sell picture postcards. It was not suggested at the trial that he broke into any of the houses, or took any step towards breaking in, or that he had any implement in his possession with which he could have broken into a house.

The conviction cannot stand unless there was some evidence before the jury that he was about to commit some offence punishable on indictment. It was open to the jury to find that his intention was to beg, or to hawk and sell his postcards, but he was not charged with begging, or with hawking without a licence. If it is said his object was to steal, or to break into a house, there was no evidence of any kind given at the trial which would support this contention. There was no evidence before the Court from which any reasonable or intelligent jury could come to the conclusion that he was about to commit an indictable offence.

In corroboration of his story the prisoner at the trial produced certain cards. The learned Deputy-Chairman directed the jury that the prisoner might have obtained these subsequent to his arrest. This was an untenable suggestion, but may well have affected the mind of the jury.

R. A. Gordon for the Crown. There was ample evidence before the jury that he was about to commit an indictable offence. What was his object in going in and out of these three gardens one after the other? No one would believe that it was possible, or that the appellant hoped to sell those advertisement cards which he called picture postcards. The appellant did not go into the witness-box, but made a statement from the dock which contradicted the sworn testimony of the police. If the jury believed the police officers, they were at liberty to draw an adverse inference from the fact the appellant denied that he had

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been in two of the three houses. If he had been to the houses for an innocent purpose, he would have had no object in denying the truth, but if the only purpose he had in going to the houses was to attempt to break into them or to steal, he would be inclined to deny that he had gone to them.

COLERIDGE J.: The appellant was convicted under s. 7 (3) of the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, which runs as follows: "Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence against this Act . . . . under the following circumstances or any of them. . . . (3) If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought, that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction." This Act is a very stringent Act, and as we have had occasion to say before, the punishment provided by the Act is not to be invoked on mere suspicion. To enable the prosecution to succeed there must be some positive evidence that the prisoner was about to commit an offence punishable as stated. In this case the appellant was seen in broad daylight, about 1.30 in the afternoon, to go from house to house. It may be that he went to the houses for the purpose of begging or of selling his picture post-cards, but he was not indicted, and could not be indicted, for being found in a public or private place under circumstances that satisfied the jury he was about to beg or hawk without a licence. The only offences that could be suggested to satisfy the indictment were larceny or housebreaking. What evidence was there that he was about to commit or was waiting for the opportunity to commit, or to help someone else to commit either of these offences? No stolen articles, no implements for breaking into a house were found on or near him. There was some mention of a window being open, but it was clearly proved that the appellant was in no way responsible for that. The learned judge seems to have left it to the jury to find that the whole story about the picture post-cards was

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an afterthought, and invited them to come to the conclusion that there was no excuse for the presence of the appellant at or near the side doors of those houses. He also surmised that the cards which he produced had been provided for him by some other prisoner in the prison van. He told the jury "where he got them from, nobody knows, because if you believe the officer who searched him, and he said he searched him thoroughly at the police court, there was nothing of the sort upon him then: yet when he gets to the prison, after having been with other men in the van who were being brought from the police court to the prison, then these three cards are found upon him, and those are the three cards he says he was trying to sell at these houses." After carefully considering the whole of the evidence in the case, we have come to the conclusion that though some of the circumstances were very suspicious, there was not sufficient evidence to justify the jury in coming to the conclusion that the appellant was about to commit, or was waiting for the opportunity to commit or aid another person to commit, the offence of larceny or housebreaking. It may be that the police acted too soon, or it may be that the appellant had no guilty intention; in either event the conviction must be quashed.

Conviction quashed.

S. M.

HARRY ARTHUR CRANE, EDMUND FRANK CRANE AND EDWARD JOHN CRANE.

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Harry Arthur Crane, Edmund Frank Crane and Edward John Crane.

A direction which did not make clear the distinction between the sale of goods "under value" and "under cost price" may be ground for quashing a conviction.

These were appeals against conviction on a point of law and also appeals against conviction on fact by leave of Horridge J., and applications for leave to call further evidence. The appellants Henry Arthur Crane and Edmund Frank Crane were, together with their father, the appellant Edward John Crane, and their mother, Edith Maud Crane, convicted at the Birmingham Assizes on March 20th, 1911, of having during the years 1908, 1909, and 1910, unlawfully and deceitfully combined

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and conspired together to cheat and defraud the creditors of Edith Maud Crane of divers sums of money and property belonging to them, and the sentences passed by Hamilton J. were six months' imprisonment with hard labour against Harry Arthur Crane, nine months' against Edmund Frank Crane, ten months' against Edward John Crane, and the mother, Edith Maud Crane, was bound over to come up for judgment if called upon.

Hugo Young, K.C. (with him *H. Cassie Holden*) for appellants, who had been on bail and were present. The appellant Edward John Crane was bankrupt in April, 1899, and in June, 1899, his wife, Edith Maud Crane, commenced to trade as a cycle factor, employing her husband as manager. In 1904 she traded as the Petros Cycle Company with the assistance of her husband and her two sons, the three appellants. In May, 1910, the business was turned into a limited company, The Petros Motor and Cycle Co., Ltd. Harry Arthur Crane, who is now twenty-two years old, and Edmund Frank Crane, who is now twenty-four years old, during the years 1908, 1909, and 1910, bought cycles from their mother, and with the view of selling them at a profit, advertised in daily and weekly papers under assumed names and with a variety of puffing descriptions in order to induce people to buy.

The charges against the appellants were that they had conspired together with Edith Maud Crane to defraud the creditors of the latter by selling cycles to the two sons (1) at a price less than the price paid by persons known as "cycle agents," *i.e.*, dealers in cycles, and (2) at a price less than cost price.

Edith Maud Crane was made bankrupt in July, 1910, and the sale of her assets to the limited company was set aside.

The prosecutor was Mr. Appleby, the trustee in the bankruptcy of Mrs. Crane, and he stated in cross-examination that the only wrong that the sons had done to the creditors was that they bought under cost price from their mother.

There was no sufficient evidence of what was the cost price of the cycles. The only evidence given was that supplied by the accountant, which was necessarily only second-hand evidence, and inferences or theories based on figures obtained from books and stock-sheets. Some of those calculations were obviously wrong. His allowances for "overhead" or "establishment" expenses were excessive. The cost prices of the components of the cycles were calculated at the invoice price for the dearest two

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months of the year. If the prices were calculated for another two months when many of the purchases were made, the cost price would work out at a considerably less amount. It would have been quite easy to call people to prove the cost price of the bicycles, but no one was called except the accountant, who knew nothing beyond what he could gather from the books. So long as the cycles were sold to the sons at a profit, *i.e.*, at something above cost price, the creditors of Mrs. Crane were not defrauded, and the jury ought to have been, but were not, so directed by the learned judge. On the contrary, he led the jury to believe that the charge definitely was a charge of selling to the sons at a less price than to the agents, and that the contention of the prosecution was that the mother had no right to sell to the sons when there were other purchasers willing to pay better prices. There was no evidence and it was not suggested at the trial that goods were supplied to the sons at lower prices when other people, who were willing to pay higher prices, could not get them from Mrs. Crane. Bad debts were incurred through supplying goods to the agents who paid higher prices, no bad debts were incurred in sales to the sons; and it was to the interest of the mother and her creditors for the cycles to be sold to the sons at a small profit rather than to be kept for an indefinite period on the chance of getting a better price or else remain unsold altogether.

[Objections were taken against the admissibility of certain evidence against appellants, and the omission of the judge to caution the jury that they could not accept as evidence against the appellants documents which were only evidence against Edith Maud Crane. These are not further referred to, as it was not necessary to give any judgment upon them, and with regard to the application to call further evidence, it was not persisted in, the Lord Chief Justice pointing out that Mr. Young had deliberately elected to call no evidence at the trial.]

Vachell, K.C. (with him *John Wylie*) for the Crown.

[The Lord Chief Justice: Before dealing with any other part of the case, can you shew us that the learned judge directed the jury that the sales to the sons at a less price than to the agents

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or others was not a fraud upon the creditors unless the price was below cost?]

Vachell: I cannot point to any passage in which this direction was given in so many words, but the jury were told many times that they could not convict unless there was proof that the creditors were defrauded. The main part of the summing up left the sales to agents on one side altogether. The jury were intelligent men of business, and there was no substantial part of the case which the judge failed to deal with in his summing up. They were told to acquit the prisoners unless they found the sales to the sons were fraudulent and were effected for the purpose of defeating and defrauding the creditors of Mrs. Crane.

Bray J.: The charge against the appellants was that during the years 1908, 1909, and 1910 they unlawfully conspired together to cheat and defraud the creditors of Edith Maud Crane of divers sums of money and property belonging to the said creditors. They are not charged with any offence against the Bankruptcy Laws or against the Debtors Act; the charge is simply of conspiring to deprive Mrs. Crane's creditors of certain assets which should properly have belonged to them. Before 1899 the appellant Edward John Crane had carried on business as a cycle factor; in that year he became bankrupt, and from the time of his bankruptcy until 1904 his wife, Edith Maud Crane, carried on a similar business and employed her husband to manage it. She carried on this business under various names, such as the Petros Cycle Company and the Petros Motor and Cycle Company, and was assisted by the appellants, her husband and her two sons. In 1908 and subsequently she traded also as the Fabriken Cycle Co., the Royal Cycle Co., the Rival Cycle Co., and the Toreador Cycle Co., and in order to increase her trade incurred great expense in postage and otherwise. Sometimes she sent out as many as 30,000 stamped penny circulars per day. She also incurred heavy expenses with auctioneers, to whom she consigned large numbers of cycles for sale by auction. In May, 1910, she sold her business to a limited company, the Petros Motor and Cycle Co., Ltd., but as she was made bankrupt in July, 1910, the sale to this limited company was declared void, and the assets which purported to have been assigned to

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the limited company belonged to the trustee for the creditors of Mrs. Crane. We see from the summing up by Hamilton J. how the prosecution shaped their case. They alleged that cycles of particular types, part of the assets of the business, were systematically sold to the sons at *under-value*. The learned judge, in his summing up to the jury, made the following observations:

"After considerable beating about the bush we have at last got to something precise in this case as to what this charge consists of, and we are now in a position to say that the charge definitely is a charge of doing this selling at *under-value*." The word used is "under-value," which means at a value lower than might have been obtained from other purchasers, but does not necessarily mean at a price under cost. He goes on to say: "We have to deal with instances of sales by the parents under value to the sons. These were taken out by Mr. Appleby, and put together in exhibit R. referring to such sales in June, July and August, 1909. The sons were paying prices for cycles considerably less than the prices obtained from outsiders. Harry Crane was buying for 2*l*. 4*s*. a bicycle for which the agents were paying 2*l*. 14*s*. net, and Frank Crane was getting the ladies' model B. for 2*l*. 7*s*. 6*d*., while the same thing was being charged to an agent at 2*l*. 17*s*. 6*d*. Many other instances are given, and the contention of the prosecution was that Mrs. Crane had no right to sell to the sons when there were other persons paying better prices." It appears to us that the general effect of the summing up was to induce the jury to say to themselves, "if we are satisfied that these goods were sold to the sons at an undervalue, we are justified in finding the defendants guilty of the offence with which they are charged in this indictment." This inference, in fact, would be unjustifiable. The jury ought to have been cautioned that so long as each sale to the sons resulted in some profit, no matter how small, the assets of the creditors might suffer no loss, and mere selling at an undervalue was no proof of guilt. There was nothing wrong in selling to the sons at anything above cost price—it might be a benefit to the business—it certainly could not be a detriment unless it were shown that these sales prevented sales to customers at higher prices. Of this there was no evidence. We do not see in the summing up any direction to the jury that, before convicting, they must be

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satisfied that the sons bought at less than cost price, and thereby the creditors were deprived of some of the assets to which they were entitled. We have accordingly decided to allow the appeals and quash the convictions. With regard to the other objections raised by Mr. Young, we have not heard Mr. Vachell's answer: we are not therefore in a position to give any opinion about them, nor is it necessary under the circumstances.

Convictions quashed.

Young, K.C.: Edith Maud Crane has not appealed because she was merely bound over to come up for judgment if called upon, but now that the conviction is quashed against the three appellants it is obvious that the conviction cannot stand as against her, as there cannot be a conspiracy unless more than one person takes part in it. If the Court is not in a position to quash the convictions now, I ask for an extension of time for appealing.

The Lord Chief Justice: This must be the subject of a separate application. You do not represent Edith Maud Crane in the appeal now before the Court.

Solicitors for the Appellants—*Philip Baker & Co.*, Birmingham.

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Harry Crowden.

HARRY CROWDEN.

"Wanton driving" in s. 35 of 24 & 25 Vict. c. 100, the Offences against the Person Act, is not a term of art and need not be defined to a jury.

This was an appeal against conviction on a point of law and an application for leave to appeal against conviction on fact. Appellant was convicted, under s. 35 of 24 & 25 Vict. c. 100, at the Hants County Quarter Sessions of wantonly driving a motor car on March 23rd so as to do bodily harm to one A. T. Hallett, and

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was sentenced by the Chairman on April 5th to three months' imprisonment in the second division.

S. H. Emanuel for the appellant, who was not present.

The Chairman misdirected the jury by telling them that they had to consider whether an experienced man would take out a large car at night with such lights only as the appellant had described, namely, one light in front at the off side, and by going on to say that it was one of the crucial points of the case whether the light was sufficient for a driver to take out that car at night without great risk of an accident. The appellant had on the car a tail light in addition to the light in front, and it was admitted that the car had all the lights that were required by the regulations of the Motor Car Acts. [See Motor Car Registration and Licensing Order, 1903 (made under 1896 and 1903 Acts), article XI., and Motor Car Use and Construction Order, 1904, article II., made under Locomotives on Highways Act, 1896, s. 2.] The Chairman did not tell the jury as he ought to have done that the appellant was carrying all the lights required by law.

The Chairman told the jury it was usual to have two large headlights, but no evidence of this was given by any witness, nor is it accurate. He was wrong in asking the jury whether they thought the appellant could have seen the injured man if the car had the additional headlights, and in directing them that taking the car out lighted up as it was was evidence upon which they could find him guilty of wanton and careless driving. The Chairman ought to have given to the jury some definition of wanton driving applicable to the facts of the case, but he did not describe it in any way or give them any directions or assistance on the subject. He ought also to have told the jury that although the evidence given might establish a case of civil liability against the appellant, it did not necessarily make the appellant guilty of the criminal offence of wanton driving.

P. M. Francke, for the Crown, was not called upon.

Bray J.: The charge against the appellant, who is a chauffeur, was that of wantonly driving a large motor car at 11 o'clock at night

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Harry Crowden.

at the rate of twenty miles an hour in a straight street, well-lighted with electric lamps about 110 yards apart from each other, and doing bodily harm to one A. T. Hallett, whom he knocked down. The appellant's story was that he did not see the man, and it is admitted that he did not stop after knocking him down. The lights he had on the car complied with the regulations, but there were no front lights, although there was in addition to the tail light a light on the off side in front. The car was very large, and the lights for reasons given in the evidence at the trial were less than were usually carried, and the appellant gave no satisfactory reason why he did not see the man he knocked down. He was not charged with infringing any express provision of the Motor Car Acts, but there is no reason why a chauffeur who is driving at less than the statutory maximum speed of twenty miles an hour a car which complies with the statutory regulations as to lights should not be charged with and found guilty of wanton driving. It was essentially a case for the jury to decide on the evidence whether or not he was guilty of wanton driving. We can see no traces of any misdirection on the part of the Chairman. It is suggested that there was an absence of direction in a material part of the case, inasmuch as the Chairman did not give the jury a definition of wanton driving. We are of opinion that no definition was required. "Wanton" is a good old English word the meaning of which is well known, and it might be presumed that the jury would understand what was meant by it. There was ample evidence before the jury on which they could convict, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*J. M. B. Turner,* Bournemouth.

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE LUSH.

MICHAEL COLLINS.

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Michael Collins.

Murder.

The Court will not grant an application for leave to appeal on the ground that appellant was temporarily insane when he committed the crime, when that suggestion has been properly dealt with at the trial.

This was an application for leave to appeal against conviction for murder. Applicant was convicted at the Central Criminal Court on April 28th, 1911, and was sentenced to death by Grantham J.

W. W. Grantham for appellant (under s. 10 of the Criminal Appeal Act), who was not present.

The summing up of the learned judge did not give sufficient weight to the evidence of the witnesses called by the prosecution as to the strangeness of the prisoner's demeanour and utterances during the week immediately preceding the murder, witnesses who had known the prisoner intimately for some time, and who were, therefore, well entitled to be considered as to the prisoner's sudden action being one of temporary insanity.

The medical officer who had had the prisoner under observation from two days after the murder was committed up to the date of the trial, could only give an accurate account as to the prisoner's state of mind during that period, and the doctor's opinion as to the state of the prisoner's mind at the time when the murder was committed could not be otherwise than indefinite. The medical officer agreed that he had known cases where a person committed a terrible crime who was perfectly sane shortly before committing it, and the same shortly after the deed was done.

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He therefore contended that it might have been inferred that the prisoner was suffering from temporary insanity when he committed the offence.

R. F. Graham-Campbell, for the Crown, was not called on.

The Lord Chief Justice: The facts in this case were clearly established, and we are of opinion that no ground was disclosed for inferring that the appellant was insane. The matter was fully and properly dealt with by the learned judge at the trial, and there was no evidence on which we can say that the verdict was wrong. *Primâ facie*, a person is supposed to know the nature of an act, whether it is right or wrong, and there was no evidence that could have been left to the jury that was not so left, or which could have satisfied them that the prisoner was not responsible for his actions at the time he committed the murder.

Application dismissed.

S. W. C.

William Ashley Larkins.

WILLIAM ASHLEY LARKINS.

The Court has no jurisdiction to hear an appeal from the verdict of a jury finding a defendant insane and unable to plead.

This was an application for leave to appeal against conviction referred to the full Court by Scrutton J.

The applicant was indicted for criminal libel at the Central Criminal Court. On his being called upon to plead, on March 29th, 1911, a jury was sworn to say whether he was sane or not, and they found that by reason of mental incapacity he could not understand the nature of the proceedings against him. He was thereupon ordered by the Common Serjeant to be detained during his Majesty's pleasure.

Roland Oliver for the applicant (under s. 10 of the Criminal Appeal Act), admitted a difficulty in regarding the applicant as a person convicted on indictment within s. 3 of the Criminal

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Appeal Act, but the Act was framed for the purpose of assisting persons who were in any way dealt with as the result of an indictment, and, otherwise, in such a case as this there was no process by which the finding could be reviewed by a Court of law; yet the issue of fitness or unfitness to plead might be seriously mistried. The applicant had been dealt with under an indictment and exactly the same order for detention had followed as if he had been found guilty but insane. He referred to *Ireland*, (1910) 1 K. B. 654; 79 L. J. K. B. 338; 102 L. T. 608; 74 J. P. 206; 26 T. L. R. 267; 4 Cr. App. R. 74, where the special verdict of "guilty, but insane," returned under the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), was held to be a "conviction" within the meaning of s. 3 of the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), though it was said to be a word of no precise meaning, and to *Jefferson*, 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. R. 95 (1908).

PICKFORD J.: The applicant was indicted for criminal libel. As there was a doubt as to his sanity, a jury was sworn to try that special issue, and they found that the defendant was insane and unable to plead. Thereupon the usual detention order was made, against which the applicant now seeks to appeal. In order that he can do that he must bring himself within the terms of s. 3 of the Criminal Appeal Act, 1907, and shew that he is a person convicted on indictment. But he was never tried on the indictment at all, no evidence of fact was offered, and, indeed, the finding was that he was not fit to be tried. If his Majesty is at any time advised that the man has sufficiently recovered so as to be fit to plead, he may then be brought up and tried upon the indictment. As the matter stands, there has been no trial and no conviction, and the case is not within the Act.

Application dismissed.

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Isaac Foster.

ISAAC FOSTER.

Proviso to s. 4 (1) of the Criminal Appeal Act applied, despite an irregularity in procedure at the trial.

This was an appeal against conviction on a point of law. Appellant, who was not present, was convicted on April 11th, 1911, at Bradford City Sessions, on an indictment charging him with receiving property knowing it to have been stolen. The indictment charged two men, Longthorpe and Brooksbank, with stealing three bags of wool, of the value of £82 17*s.* 6*d.*, the property of the Midland Railway Company, and also with receiving the wool, and appellant with receiving it. Longthorpe pleaded guilty to receiving, Brooksbank not guilty on both counts, and appellant not guilty.

The evidence shewed that the bags of wool had been stolen by someone from a dray belonging to the railway company; that the empty bags were subsequently found on premises to which they had been taken by Brooksbank and Longthorpe, where the wool was taken out of them, and removed to other premises, where it was inspected and purchased by Foster, who ordered it to be re-dyed. No delivery note was received by Foster with the wool, and he paid for it a sum of about £41, or one-half the original value of the wool. After the case for the prosecution had closed, Brooksbank went into the box and gave evidence, and called witnesses on his own behalf, but not Longthorpe. Counsel for Foster then called his client, who said that he agreed to give a shilling and a halfpenny per pound for the wool, and that the payment of £41 was only on account. At the conclusion of his evidence, his counsel closed his case. Whereupon counsel for the Crown said that he had been taken by surprise, as he expected that the other prisoner, Longthorpe, who was called for Brooksbank only before the justices, would have been called. He asked and obtained leave to call Longthorpe, in spite of the protest of counsel for Foster, who objected that in no circumstances could Longthorpe be called for the Crown against Foster, as Brooksbank had not called him, and that even if he could have been called against Brooksbank he certainly could not be against Foster. The jury found both prisoners guilty.

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C. Mellor, for the appellant, submitted that Longthorpe's evidence was improperly admitted; that he was not called by way of rebuttal, and that counsel for the prosecution, knowing from the depositions what Longthorpe had said before the justices, was not entitled to gamble on the prospect of the defence calling him, so that he would be in a position to cross-examine, and having closed his case, was not entitled to reopen it.

[The Lord Chief Justice: The learned Recorder could have called Longthorpe.]

Yes, but then the Recorder would have questioned the man, and counsel would have had no right to examine or cross-examine. He referred to *Clibburn*, 62 J. P. 232 (1898).

Harold Newell for the Crown. The Recorder had a discretion to allow Longthorpe to be called, and, as a matter of fact, the defence was not prejudiced, since the whole tenor of his evidence was in favour of Foster and Brooksbank. He referred to *White*, 2 Cox C. C. 192 (1847).

The Lord Chief Justice: There is no doubt that the course taken at the trial was unusual, and if we were of opinion that the defendant's case had been really prejudiced or that any miscarriage of justice had occurred by reason of Longthorpe's evidence being admitted in this way, we should not allow the conviction to stand. The principle on which this Court acts in the case of an irregularity in procedure was stated in *R.* v. *Crippen*, (1911) 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 705; 75 J. P. 141; 27 T. L. R. 69; 5 Cr. App. R. 255. The calling of witnesses after the close of the defence was in the discretion of the judge at the trial, and that discretion must be exercised with a due regard to the interests of the defendant. If it were shewn that the prosecution had done something unfair—had set what has been called a trap—which resulted in an injustice to the prisoner, the Court reserved to itself full power to deal with the matter. Was the defence prejudiced in this case? Even assuming for the moment that it was, the Court had to consider the matter, having regard to the proviso to s. 4 (1) of the Criminal Appeal Act, and could dismiss the appeal if they considered that

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no substantial miscarriage of justice had resulted. The statements made by Longthorpe had been put to Foster in cross-examination, and no objection had then been taken. The Recorder had undoubtedly a discretion to allow Longthorpe to be called, and the Court were unable to see that any injustice had been done. Foster could have been recalled to contradict Longthorpe, but there was no application to do so. Without going further, all that the Court would say was that Foster's case was not prejudiced, and that there had been no miscarriage of justice. Sentence may run from the date of conviction.

Appeal dismissed.

Solicitors for Appellant—*Newman and Holmes*, Bradford.

S. W. C.

Ellen Stanton.

ELLEN STANTON.

An exhortation to "tell the truth" is not an improper inducement to confession, and a confession obtained by it is admissible in evidence against the maker.
Reeve, *L. R.* 1 *C. C.* 362 (1872), *followed.*
Sentence to detention in a Borstal Institution is peculiarly within the discretion of the Court of trial.

This was an appeal against conviction on a point of law, and also an application for leave to appeal against sentence.

The appellant was convicted at Bucks Quarter Sessions on March 3rd, 1911, of stealing some rings from her mistress, and ordered by the learned Chairman to be detained in a Borstal Institution for twelve months. The case against her rested mainly on her own admissions. The evidence was that after the rings were missed the mistress said to her, "Now, Ellen, have you seen my rings? Be a good girl, and tell the truth," whereupon the girl said she had taken the rings and given them to her mother. On subsequent occasions she had made conflicting statements as to what she had done with the property. It also appeared that at some time the mistress had said to her, "If you will give me back my rings, I will forgive you."

C. K. Tatham for the appellant (under s. 10 of the Criminal

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Appeal Act), who was not present, argued that it was not clear that the last-mentioned words had not been said before any confession. The appellant in her evidence at the trial had said that she was frightened and afraid of being locked-up, and so made statements that were untrue. There was evidence that the girl, though seventeen years of age, could not read or write, nor tell the time, and was described as being "not bright." He submitted that in the circumstances the girl's statements should not have been admitted, and that the learned Chairman in summing up did not sufficiently direct the jury to consider the girl's state of mind when she made the admissions.

Ryland Adkins, for the Crown, was only called upon to support the sentence. The object of the Court was to remove the girl from her home surroundings and place her in conditions where she would be taught and trained. He referred the Court to the Chairman's report to the Court.

PICKFORD J.: The appellant, a girl seventeen years of age, was convicted of stealing rings belonging to her mistress. She appeals on the ground that she was convicted on confessions which ought not to have been admitted in evidence. The statement of the mistress—"Ellen, have you seen my rings? Be a good girl, and tell the truth"—was not an inducement held out to confess. In that respect the case was almost on all-fours with *Reeve,* L. R. 1 C. C. 362; 41 L. J. M. C. 92; 26 L. T. 403; 12 Cox C. C. 179 (1872), where the words used were "You had better, as good boys, tell the truth," and the subsequent confessions were held admissible. If the mistress's words—"If you will give me back my rings, I will forgive you"—had been the first spoken, it would be a grave question whether an answer then made would not be inadmissible, but looking at the whole evidence they thought that the first observation, the one which led to the confession, was "Ellen, be a good girl, and tell the truth," which was not an inducement that could be objected to. There had been no miscarriage of justice by the admission of the further evidence after the second statement, and the conviction must stand. As to the sentence, it was a matter within the discretion of the Court of trial, and the minimum sentence of detention in a Borstal Institution had been given. It would not be right for this Court to

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interfere with the discretion of the Bench, who had all information before them. The sentence must stand, but will run from the date of conviction.

Appeal dismissed.

S. W. C.

ROBERT HICKEY.

Robert Hickey.

Conviction quashed on the ground that the rule laid down by this Court in Norton's *case, 5 Cr. App. R.* 65 (1910), *had been violated.*

This was an appeal against conviction, by leave of Scrutton J. Appellant was indicted with three others at Liverpool City Sessions for receiving stolen property, and was convicted and sentenced by the Recorder, on April 7th, 1911, to eighteen months' imprisonment with hard labour. Practically the only evidence against appellant was a statement made by a police officer that, on being arrested and charged in the presence of appellant, one of the other prisoners had made a statement incriminating appellant. The latter denied that he was present then and did not admit the truth of that statement, and always said that he knew nothing about the subject-matter. The Recorder admitted the evidence and did not tell the jury that the statement was not evidence against the appellant.

T. C. P. Gibbons for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was no evidence to connect appellant with the crime. The only suggested evidence was that another prisoner when charged made allegations against appellant in his presence. The mere allegation by another prisoner is not in itself evidence against appellant. There must be something in the nature of an admission by the appellant that the statement is correct, or, at any rate, consent by admission or silence. The evidence here is that appellant denied that he heard any such statement made in his presence. The learned Recorder misdirected the jury. He said, referring to the incriminating statement, "That is stated in Hickey's (appellant's) presence, and is, therefore, evidence that you are entitled to consider." This was surely a misdirection. The learned Recorder's direction is contrary to the decision of this Court in *Norton*.

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That case is also an authority for the proposition that this case cannot be supported by the proviso to s. 4 of the Criminal Appeal Act, which enables the Court to dismiss the appeal if they consider no substantial miscarriage of justice has occurred. There was here no evidence to support the conviction, but there was a serious misdirection, and therefore a miscarriage of justice.

A. J. Lawrie for the Crown, admitted that in view of *Norton*, it was impossible to support the conviction.

Lush J.: This appeal is based on the wrongful admission of evidence and misdirection. Substantially the whole evidence against Hickey was contained in the statement made by another prisoner at the time of arrest. Hickey denied both the truth of the statement and that it was made in his hearing. There had been no acknowledgment or admission of the facts of such statement so as to make it admissible under the principle laid down in *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 5 Cr. App. R. 65, and it is clear there has been both a wrongful admission of evidence and a misdirection on the point by the Recorder. The conviction cannot stand.

Conviction quashed.

S. W. C.

WILLIAM SMITH.

William Smith.

In considering the severity of a sentence, the Court may take into account the fact that an untried indictment is pending against appellant, and may inquire whether he confesses it.

Appeal against conviction and sentence, by leave of Scrutton J.

Appellant had been convicted at West Riding Quarter Sessions of larceny of a pair of boots, and sentenced on April 5th, 1911, to twelve months' imprisonment with hard labour. A second indictment for larceny was ordered to remain on the file of the Court.

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William Smith.

W. Marsh, for appellant (under s. 10 of the Criminal Appeal Act), who was present, said that six weeks after the theft appellant was found wearing the boots, and that owing to the length of time that had elapsed since the stealing, the jury were not warranted in concluding that he stole the goods in the absence of a satisfactory explanation as to how he came by them. He cited *Cooper*, 16 Jur. 750; 3 Car. & Kir. 318 (1852), where the interval was six months, and *Anon.*, 2 C. & P. 459 (1826), where it was sixteen months. In *Adams*, 3 C. & P. 600 (1829), it was three months.

[The Lord Chief Justice: If we decide this appeal in the appellant's favour, we shall have to send him back to be tried on the second indictment. You had better confer with him.]

Counsel, having conferred with appellant, stated that he admitted the charge contained in the other indictment, and wished this Court to deal with the whole case.

Dransfield for the Crown.

The Lord Chief Justice: There was evidence to go to the jury on which they could convict, but there should have been some direction as to the lapse of time weakening the presumption against the prisoner—an interval of six weeks may be too long to allow of the presumption. But it is not necessary to decide that. The appellant admits the second indictment. On the whole, and taking into account the second charge, we think the sentence was too severe, and we order it to be reduced to six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

S. W. C.

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Joseph Bennett and David James Holloman.

JOSEPH BENNETT AND DAVID JAMES HOLLOMAN.

Severity of sentence.

Bennett appealed against his conviction and sentence, by leave of Scrutton J., and Holloman appealed against his sentence, by leave of Scrutton J., and also against the order of Scrutton J. refusing him leave to appeal against conviction.

The appellants had been convicted of larceny at Northampton Sessions on April 6th, 1911, and were each sentenced to three years' penal servitude. They were not present and were not represented.

Dyer, for the Crown, was only called upon as to sentence. He called attention to the records of both men. Although Bennett had never been previously convicted on indictment, and Holloman had been convicted only once previously on indictment, there were several summary convictions recorded against both. The Court had also before it information given by a detective as to the characters and antecedents of both applicants.

The LORD CHIEF JUSTICE: There is no reason whatever to doubt that the appellants were rightly convicted, but the theft was trivial, and the Court is of opinion that the sentences are too severe, and they will be reduced in each case to a sentence of twelve months' imprisonment with hard labour.

Sentence reduced.

S. M.

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Thomas Richmond.

THOMAS RICHMOND.

Severity of sentence.

This was an appeal against sentence, by leave of Scrutton J. Appellant was convicted of larceny from a van, and was sentenced at the Bradford City Sessions, on April 10th, 1911, by the Recorder to eighteen months' imprisonment with hard labour.

The appellant was not present and was not represented.

Harold Newell for the Crown. Van robberies are very numerous in the neighbourhood, and an exemplary sentence was desirable to act as a deterrent.

Lush J.: The sentence appears to the Court to be somewhat severe. There is no previous sentence except for a very short term of imprisonment, and we think this sentence should be reduced to twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD AND MR. JUSTICE LUSH.

HENRY ADAMSON.

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Henry Adamson.

On the trial for an offence on a given date, evidence of conduct on a later date similar to that proved on the date charged is admissible as tending to prove system.

This was an appeal from a conviction for larceny, before the Common Serjeant, at the Central Criminal Court on April 29th, 1911.

The prisoner was charged with larceny on March 24th, 1911. It appeared that he and a man named Alexander, acting in concert with another, adopted the following device. Observing a girl leaving a bank, Alexander took off his hat and coat, which he gave to the appellant to hold. Running after the girl with a pencil in his hand, he told her that there was something wrong with the cheque which she had presented. She then handed the money she had obtained at the bank to Alexander, who handed her an envelope which was said to contain a cheque. On being opened subsequently it was found to contain blank telegraph forms. Alexander pleaded guilty. Appellant was convicted and sentenced to twelve months' imprisonment with hard labour. He appealed from this conviction on the ground of wrongful admission of evidence. He also asked leave to appeal against the sentence.

G. St. John McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

On the point of law the complaint is that counsel for the prosecution in opening the case referred to the fact that when the two men were arrested on March 31st, a week after the alleged offence,

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the appellant was seen in the company of Alexander, outside a bank, and blank telegraph forms were found on both of them. He relied upon that fact as evidence of a system. It is submitted that the statement made by counsel, and the evidence given in support of it, ought not to have been admitted. Evidence was given that on March 31st the two men were seen waiting outside a bank, and then Alexander, with an envelope in his hand, followed a boy who had just left a bank, giving his hat and coat to appellant to hold just as in this case. He referred to *Makin* v. *Attorney-General of New South Wales* (above, p. 31); *Winslow*, 8 Cox C. C. 397 (1860); *Ellis*, (1910) 2 K. B. 746; 79 L. J. K. B. 841, 74 J. P. 388; 102 L. T. 922; 26 T. L. R. 535; 5 Cr. App. R. 41. They were both, in fact, taken in charge on March 31st for loitering for the purpose of committing a felony, but not on this charge.

Horace Samuel, for the Crown, was not called upon.

PICKFORD J.: The appellant was convicted of stealing 30*l*. A girl had been sent to get money from a bank. A man named Alexander, by pretending that there was something irregular about the cheque, induced her to part with the money. The appellant was clearly acting with Alexander; and the main ground of this appeal is that evidence was admitted to shew that a week later appellant was assisting Alexander in the same way. In our opinion that evidence was admissible. As to the application for leave to appeal against sentence, we do not think it should be granted. This class of offence is becoming too common, and the sentence does not appear to be excessive.

Appeal dismissed.

W. V. B.

ALFRED JOHN WILSON.

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Alfred John Wilson.

The number of claims for compensation for accidents during a short period may be primâ facie *evidence of false pretences.*

The proviso to sect. 4 (1) *of the Criminal Appeal Act applied, when evidence was improperly admitted.*

Appeal from a conviction before the Deputy-Chairman at the County of London Sessions on April 26th, 1911. Appellant was charged with obtaining by false pretences from John Burden and the London & North Western Railway Company the sum of £7; from Henry Archer Pascall and from Messrs. Tilling, Ltd., the sum of £6, in each case with intent to defraud. He was further charged with conspiring and agreeing with one Penalver, Abraham Lewis, and divers other persons unknown to obtain from the London & North Western Railway Company the sum of £6, and divers other sums of money, with intent to cheat and defraud. According to the evidence, appellant represented to the London & North Western Railway Company that on March 17th, 1910, he had sustained injury by catching his toe in a defective stairway at one of the company's stations. This representation was alleged to be false, although the company, after making enquiries, had paid the sum of £7. The sum of £6 was obtained from Messrs. Tilling upon a representation by the appellant that he had stumbled over a loose rug in the street. No evidence was called on the part of the prosecution to prove affirmatively that these accidents had not happened; but evidence was adduced to shew that in May, 1906, the appellant applied to the Ocean Accident Guarantee Company on behalf of his mother, claiming damages for an injury sustained by her in falling over a mat at a shop in Walthamstow. It was also proved that on April 1st, 1910, appellant made a claim against the Great Western Railway Company in respect of an injury alleged to have been caused by his catching his foot in some reins lying on the pavement in Fleet Street. In the course of the re-examination of a witness for the prosecution, counsel for the prosecution put in a statement made and signed by Mrs. Wilson, dated January, 1907, which had been obtained from her by the Ocean Accident Corporation. This statement contained certain observations adverse to appellant, and its admission was objected to by counsel

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at the trial. After it had been read, the Deputy-Chairman observed: "I did not know what was in it; now I have heard it read I do not think it is evidence," and strongly cautioned the jury against taking it into account. Appellant was convicted on all counts, and was sentenced to twelve months' imprisonment with hard labour.

Roome for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

There was no evidence adduced at the trial that these were bogus accidents. On the contrary, the various claims were paid after due enquiry. The fact that a number of claims were sent in during a short period by the same man, is not evidence that the claims were fraudulent. Affirmative evidence should be called by the prosecution. As to the charge of conspiracy, the evidence is that of Lewis, who was an accomplice, which was uncorroborated except by a letter said to have been written by appellant, but his handwriting was not proved, except by certain receipts. Finally, the statement by Mrs. Wilson ought not to have been admitted. There was nothing in the cross-examination to justify its being tendered in evidence. She was not called as a witness. The statement tended to corroborate the evidence of Lewis; and the impression it created could not be removed from the minds of the jury.

J. P. Grain (with him *Forrest Fulton*) for the respondents, was heard on the question of the admissibility of Mrs. Wilson's statement. The statement was admissible having regard to the cross-examination. Without that cross-examination it is conceded that the statement would have been inadmissible. The principle is that once it is established that there is a combination, any act or speech of one of the conspirers is evidence against any other. But even assuming the statement was improperly put before the jury, there is no evidence here of any substantial miscarriage of justice.

Lush J.: The appellant was charged with obtaining money by false pretences and with conspiring with others to defraud. As to the charges of obtaining money by false pretences, it is contended that there is no sufficient evidence. The false pretences alleged were that the appellant stated that he had suffered acci-

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dents when in fact he had not. In our opinion there was evidence sufficient to warrant the case being left to the jury. It was alleged that the appellant had sustained three accidents in the short space of four or five weeks. That, of course, is not conclusive evidence of guilt, but the fact that so many claims were made, the character of the claims and the circumstances in which they were made, afford some evidence. Further, there is the direct evidence given by Lewis. It is true he was an accomplice; but he said he had been in the company of the appellant, and he denied the occurrence of accidents, and his evidence went far towards establishing that these were bogus claims. It is also suggested that there was no evidence of conspiracy except that of defendant Lewis. We cannot lose sight of the fact that the documents tended to corroborate his evidence. Wilson did not go into the box to deny his signature. On these grounds we should be prepared to hold that the appeal fails. A more difficult question arises with regard to the admission of Mrs. Wilson's statement in evidence. The prosecution attempt to justify its admission on the ground that it was let in by the cross-examination; but we find nothing to support that view. If we thought that the admission of this evidence had led to a miscarriage of justice we should have had no alternative but to set the conviction aside, but we are of opinion that there has been no substantial miscarriage. Moreover, the learned Deputy-Chairman expressly stated after the document was read that it was not evidence against the prisoner.

Appeal dismissed.

Solicitors for the Respondents—*C. de J. Andrews.*

W. V. B.

CHARLES HENRY LAYCOCK.

Charles Henry Laycock.

Severity of consecutive sentences.

Appeal from convictions before Horridge J. at the Leeds Assizes on March 14th, 1911, and May 6th, 1911.

The appellant was indicted at Leeds Winter Assizes for (a) the larceny by a trick of £5, the property of William Handley, at Dewsbury, on September 16th, 1910; (b) larceny by a trick of £5, the property of Catlow Greenhalgh, at Wakefield, on Novem-

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ber 12th, 1910; (c) larceny by a trick of £1, the property of Arthur Stembridge, at Leeds, on November 8th, 1910; (d) larceny by a trick of £5 10*s*., the property of Henry Frank Kirby and others, at Bradford, on December 22nd, 1910.

He was tried on March 14th, and convicted on indictments (a) and (b), and sentenced to six months' imprisonment with hard labour on each indictment, to run consecutively, indictments (c) and (d) being endorsed "not proceeded with," and placed upon the file.

From these convictions he obtained the leave of the full Court to appeal, and to call further evidence, and the appeal came on for hearing on May 1st, before Alverstone L.C.J., Bray and Coleridge JJ. Further evidence was called. Before the argument of counsel for the appellant was concluded the Court adjourned the appeal, and ordered the appellant to be sent back to Leeds to be tried at the Leeds Spring Gaol Delivery on indictments (c) and (d).

He was accordingly tried on May 6th, and convicted on indictment (d), but acquitted by a fresh jury on indictment (c), and sentenced to six months' imprisonment with hard labour, to follow the former sentences.

The appellant's defences to charges (a), (b) and (c) were *alibis*.

From the conviction on indictment (d) the appellant sought leave to appeal, and his application was treated as a final appeal.

L. G. Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The hearing of the appeal from convictions (a) and (b) was adjourned pending the trial of the appellant on charges (c) and (d). He was tried and convicted on charge (d), but was acquitted on charge (c). He now appeals from his conviction on charge (d) on the ground that there was no sufficient evidence of identification. The facts were that on December 22nd, 1910, one Nellie Newbolt was sent to the Commercial Bank at Bradford by her employers to change a five pound note and thirty shillings in gold. Having procured the change, she was accosted by a man who was said to be the appellant, who told her there was "something wrong with the cheque she had presented at the bank," and asked her to go back with him to the bank. Although she had in fact presented no

cheque, she handed over the money to the man who had spoken to her. He gave her an envelope, which on subsequently being opened was found to contain nothing but a page of "John Bull." On January 9th, 1911, she identified the appellant at the Leeds Town Hall as being very much like the man who had taken her money. In cross-examination her evidence of identity was somewhat more emphatic. The only evidence to corroborate the weak statement of the girl on the question of identification was that of the detective, who said that he knew the appellant by sight, that a complaint was made to him on December 22nd, and that in consequence he looked out for the appellant. Up to December 22nd he had seen him almost daily in Bradford. After that date he had looked for him daily, but could not find him in places where he was in the habit of seeing him. The appellant had been a billiard marker, but had become a betting man. The evidence of the detective really amounts to this—"I was about the streets where the prisoner usually is, and did not see him." It is clear that when she first had an opportunity of identifying the appellant the girl had a difficulty.

The Court had before it on the other charges evidence that there was in the West Riding of Yorkshire a man of the name of Batty who had been convicted of larceny by a trick, who bore a striking resemblance to the prisoner. This was not before the jury on the hearing of this charge. The Court were therefore in a better position to decide the case than the jury.

The appellant lived in Bradford, where the offence was committed, and therefore could not be expected to produce evidence of an *alibi*, and had he done so it would have been open to suspicion.

The acquittal on charge (c) cast a doubt upon the other convictions.

As to indictment (a), the evidence of the new witness Maley, who was called on May 1st, by its nature established the appellant's defence that he was at Ayr Races on the date in question, so that in order to uphold the conviction, it was necessary for the Court to disbelieve his evidence. There was no ground for suspecting his credibility.

Laurie, for the Crown, was heard only with regard to charge (d). The girl's evidence of identification is sufficient.

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A person who is certain at the beginning of the identification is frequently less likely to be right than one who takes time to make up his or her mind. Although she said at first that he was very like the man, she had no doubt whatever later on that appellant was he. It was a question for the jury.

Hoare, in reply.

The Lord Chief Justice: In this case we have heard the application for leave to appeal from the conviction for larceny at Bradford on December 22nd as a final appeal. Without saying what we should have done had we been sitting as a jury, we are bound to recognise the findings of the jury on fact. A question of identification is essentially one for a jury to decide. They saw the prisoner and the witnesses, and were satisfied that he was identified by the girl from whom he obtained the money. Moreover, it must be borne in mind that this was a crime of a peculiar character. It was proved that the appellant was not seen for a fortnight after the occurrence in his usual haunts. A conviction in circumstances such as these cannot be set aside unless we are convinced that there was no evidence upon which the jury could have properly acted. It is not seriously contended that there was any misdirection.

Coming next to the two offences alleged to have been committed on September 16th and November 12th, we adjourned the hearing of these appeals in order that the further charges against the appellant might be investigated. With regard to these two cases, it was objected that photographs were used as a means of identification, and we allowed the appellant to call further evidence. In the Wakefield case he sought to prove an *alibi*. The offence was committed at Wakefield at 11 a.m., and the appellant adduced evidence that he had been drinking with a friend, who was called before us, at Bradford up to 11.30 on that day. It takes thirty-five minutes to get from Bradford to Wakefield. We are not disposed, however, to attach any weight to the evidence of the witness called on this point by the appellant. In the Dewsbury case also an attempt was made to establish an *alibi*, but we are not satisfied that the witness called was accurate as to the date. In these circumstances we must affirm all the convictions. The question remains as to the punishment to be

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inflicted. This is a crime which is on the increase, and which requires skill and adroitness. The appellant was convicted of three similar offences which appear to have been committed about the same time. The sentence of the Court is that he be imprisoned for twelve months with hard labour, to run from the date of the first conviction.

Sentence reduced.

W. V. B.

Lily Hayden.

LILY HAYDEN.

On an allegation of being a habitual criminal mere evidence that accused has been at work since his last release from prison is not a sufficient defence.

Appellant had pleaded guilty at the County of London Sessions on April 27th, 1911, to five indictments for larceny, and was convicted of being a habitual criminal. She was sentenced to three years' penal servitude and five years' preventive detention.

The prisoner had been released on licence on December 24th, 1910, after serving her last sentence of eighteen months' hard labour. Since her release the prisoner stated that she had lived with her brother until February 26th, 1911, and it appeared that she then obtained employment at 3*s*. a day, which continued until her arrest on March 24th. Three of the offences to which she had pleaded guilty were committed on February 4th, 1911, and the other two on March 18th, while she was still at work.

Twelve previous convictions, including four terms of penal servitude (two of these being concurrent sentences) for similar offences to those to which she had pleaded guilty, were proved. The first conviction dated from December 1st, 1883, when the prisoner, who stated that she was then 11 years old, was sentenced to two months' imprisonment with hard labour.

Appellant, in person, appealed against her sentence, and against the order of Scrutton J. refusing leave to appeal against her

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conviction as a habitual criminal on the ground that she had been at work since she came out of prison.

Julian Q. Henriques for the Crown.

The Lord Chief Justice: It has been contended that the fact the accused has been at work since his last release from prison is an answer to the charge of being a habitual criminal. But the Act requires an honest life in that period, of which work being done may be evidence. In this case, although the appellant, when she committed some of the offences charged, was in work, the work was a mere cloak.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GRANTHAM AND MR. JUSTICE PICKFORD.

LOUISA HILLIER.

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Louisa Hillier.

Severity of sentence.

In a grave case it may be proper to try a convict undergoing sentence, for a crime similar to that for which the sentence was inflicted but not taken into account in that sentence, and on conviction to impose a severer sentence.

This was an appeal against sentence by leave of the full Court Appellant was convicted at the Birmingham Assizes on March 21st, 1911, of feloniously using an instrument to procure abortion in April, 1910, and was sentenced by Hamilton J. to seven years' penal servitude.

Maddocks for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The sentence is too severe. The appellant was convicted in July, 1910, before Darling J. of a similar offence committed in May, 1910, one month after the offence for which she was tried before Hamilton J. The sentence passed by Darling J. was three years' penal servitude, and before passing sentence he was informed by the police of various other similar offences attributed to appellant, including, it is suggested, the offence of April, of which she was subsequently convicted before Hamilton J.

[THE LORD CHIEF JUSTICE: Darling J. informs us that in passing the sentence of three years' penal servitude he knew nothing about the offence of April, 1910.]

But it is obvious from the shorthand notes of his judgment that he did not regard the offence of May as a solitary offence. He said: "There can be no doubt that you have made a prac-

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tice of yielding to the entreaties of women . . . . and performing that sort of operation for the fee that you got in this case."

In the trial before Hamilton J. the prisoner never applied for legal aid, and no legal aid was assigned to her, and no one said a word on her behalf. The other prisoner, Mrs. Pickering, who was charged together with appellant, was defended by counsel, and she was sentenced to only eighteen months' imprisonment with hard labour. Appellant never asked a question of any of the witnesses, and did not say a word on her own behalf. She was brought to Court from the prison where she was undergoing her previous sentence, and she thought, as anyone might have thought, that she was joined in the charge merely for the purpose of making the charge complete as against her fellow-prisoner, Mrs. Pickering, and of enabling the necessary evidence to be given to explain the full facts of the case to the jury.

R. A. Willes for the Crown: The surrounding circumstances of the offence in May for which appellant was convicted before Darling J. in July, 1910, were very different from the earlier offence of April, 1910. The woman upon whom the illegal operation was committed in May, 1910, was a married woman over 40 years old, who had repeatedly requested appellant to commit the operation on her, and appellant had refused several times, though at last she yielded to the woman's importunities. The victim of the April offence was Jenny Jewitt, a young servant girl not 21 years old, who had never seen appellant before.

Maddocks, in reply: The operation on Jenny Jewitt did not do her any lasting injury. Her child was born at the proper time, and was and is strong and healthy. When Darling J. passed his sentence of three years upon appellant, it was known that the woman in that case had died, though it was not possible to prove that the proximate cause of her death was the illegal act committed by the appellant.

Appellant was sentenced by Darling J. as a habitual offender, and when she has served that sentence she ought to come out with what is described as a "clean slate," and ought not to be liable to be tried and sentenced for a similar offence committed a month before, even if the judge at the trial was not informed

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of it before he passed sentence. He referred to *Douglas Campbell*, 6 Cr. App. R. 131; 55 S. J. 273; 27 T. L. R. 255 (1911).

The Lord Chief Justice: We are glad that this case has been argued, though we have come to the conclusion that the sentence should not be varied. It is very desirable that as the appellant has been sentenced within a period of twelve months to two terms of three years' penal servitude and seven years' penal servitude respectively for similar offences, we should consider whether the later sentence was too severe or not, especially as it was passed in respect of an offence which could conceivably have been taken into account in the earlier sentence. Without knowing the facts, it was not unnatural for Mr. Maddocks to assume that Darling J., who told the appellant that she made a practice of performing that sort of operation, passed upon her in July, 1910, a sentence of three years' penal servitude as an adequate punishment, although he knew that the operation of May, 1910, was not an isolated offence. Mr. Maddocks made a further assumption which we now know to be entirely without foundation, that Darling J., before passing sentence, was informed of the April offence, the subject-matter of the trial before Hamilton J. We now know that no information whatever was given to Darling J. concerning the offence in April, 1910, committed upon Jenny Jewitt, and as regards the other information given to the learned judge before passing sentence we notice that her counsel asked him not to pay attention to the "tittle-tattle" that the police have heard since the case came up. It is therefore clear that in his sentence of three years' penal servitude, Darling J. did not take into account the offence of April, 1910, against Jenny Jewitt, and we have now to consider whether we are satisfied that on the facts proved in the case of Jenny Jewitt, a sentence of seven years' penal servitude is too severe. The appellant is proved to be a habitual abortion-monger. Procuring abortion is a very serious crime; not only do the unfortunate victims incur serious danger, and often suffer severe and permanent injury, but this offence is one which in a very large number and perhaps in the majority of cases passes undiscovered. The victims of the illegal operations are accomplices in the crime, their evidence requires corroboration, and there are often many difficulties in the way of proving the guilt of the accused person.

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When, as in this case, the guilt of the prisoner is clearly proved, it is the duty of the judge to pass a sentence which will act as a deterrent. Can it be said that seven years' penal servitude for a habitual abortion-monger is too severe? In our opinion it is not. We consider this a very grave case, and have not lost sight of the fact that she had already served eight or nine months of the sentence passed by Darling J. The appeal will be dismissed, but the sentence will date from conviction.

Appeal dismissed.

S. M.

Richard Johnson.

RICHARD JOHNSON.

To retain possession, innocently acquired, of stolen property with knowledge that it has been stolen, is not receiving property with guilty knowledge.

This was an appeal on certificate of the Chairman of Quarter Sessions for the County of Middlesex. Appellant was charged, together with a man named Benjamin Gough, with stealing a gelding on the 24th day of April, 1911, and also with receiving it, knowing it to have been feloniously stolen. The trial took place on May 6th, and the evidence was that the gelding was safe in its stable at 8.30 p.m. on April 22nd, and was stolen before 8.15 a.m. on April 23rd, and was taken by Gough to appellant on April 24th, and Gough agreed to sell it to appellant for £8; appellant agreed to buy it, paid £1 on account, and kept the gelding and used it in the way of his business. On May 1st Gough informed appellant that the gelding was stolen, but appellant refused to part with it, and retained possession of it until his arrest on May 3rd.

The jury found that appellant was guilty of having the gelding in his possession knowing it was stolen, for the three days, May 1st, May 2nd and May 3rd, and they added that they thought he acted foolishly, and recommended him to mercy, but they found him guilty of receiving on those three days.

The Chairman released appellant upon his own recognizances in the sum of £10 to come up for judgment if called upon, and

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certified that it was a fit case for appeal, on the ground that the jury found as a special verdict that the prisoner did not know at the time, 24th April, 1911, he took the gelding into his possession that it was stolen property, but that he was guilty of "receiving" on the 1st May, 1911, at which date he did know that the gelding was stolen property.

E. S. Abinger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. A person cannot be found guilty of receiving property knowing it to have been stolen, unless it is shewn that he knew it was stolen property at the time he received it. In this case appellant received the gelding on April 24th, and at that time he did not know it was stolen. He used it every day for his business until May 1st, and all that week he had no knowledge that it was stolen. It was wrong to say that he received it on May 1st, 1911, knowing it was stolen; he did not receive it on any other day except on 24th April. He referred to *Flowers*, 10 Q. B. D. 643; 55 L. J. M. C. 179; 54 L. T. 547; 16 Cox C. C. 30; 50 J. P. 648 (1886); C. C. R.; *Glyde*, 1 C. C. 139; 37 L. J. M. C. 107; 18 L. T. 613; 11 Cox C. C. 103 (1868); and *Riley*, Dears. C. C. 149; 22 L. J. M. C. 48; 6 Cox C. C. 88 (1853).

Samuel Moses for the Crown. Receiving is a continuous act. Gough informed the appellant on May 1st that the gelding was stolen, and wished to take it away. The appellant at first made no objection, and expected Gough to call later on, and was going to give it back to him, but afterwards he changed his mind, and refused to give it up. For some time on May 1st he held the gelding at the disposal of Gough; later on, when Gough wanted it, he refused to give it up, and then he held it not for Gough, but for himself. This constituted receiving on the principle underlying *Ashwell*, 55 L. J. M. C. 65; 53 L. T. 773; 16 Cox C. C. 1; 50 J. P. 181 (1885); C. C. R.; *Woodward*, L. & C. 122; 31 L. J. M. C. 91; 9 Cox C. C. 95 (1862), shews that a man can be guilty of receiving property knowing it to be stolen, although before he knew of its existence or of its being stolen it was already in his house. In that case the wife, in the absence of her husband, received the stolen property in his house,

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and paid something on account of the purchase price, subsequently the husband met the thief, and bargained with him as to the price, and when it was agreed, paid him the balance, less the amount paid by the wife. It was held by the Court that the husband did not receive the property until he had agreed the price to be paid, and when he agreed the price he knew the property was stolen. It must be admitted, however, that an innocent receipt of a chattel is not converted into larceny by the fact that the person in possession subsequently decides fraudulently to appropriate the chattel. *Ashwell* and *Flowers* (above).

GRANTHAM, J.: The jury in this case have found that the appellant did not know on the day when he took the gelding into his possession that it was stolen property, and the undisputed facts of the case shew that he kept it in his possession until the day of his arrest. He was informed on May 1st that it had been stolen, but at that time it had been already in his possession for a week, and nothing took place on that day or subsequently which could be construed into a fresh act of receiving. He had paid £1 on account of the price of the gelding on April 24th, and it may be that he acted dishonourably or even dishonestly in insisting upon keeping possession of the horse until he was repaid the sovereign he had parted with, but we have nothing to do with that here, and we cannot see in the evidence any circumstance which constituted a fresh act of receiving. The innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute the crime of larceny, and in the same way the innocent receipt of a chattel, and a subsequent dishonest appropriation of it after knowledge that it is stolen do not constitute the crime of receiving unless something takes place after the guilty knowledge which can be regarded either as a fresh act of receiving or as completing the original receiving if the latter was in fact incomplete at the time. It may be, in this case, that the summing up of the learned Chairman and his direction to the jury was a little too favourable to the appellant, but we must accept the findings of the jury, and as they found as a fact that the appellant did not know the gelding was stolen when he received it on April 24th, and as there was no evidence of any fresh receiving by the appellant on May 1st,

May 2nd, or May 3rd, the conviction for receiving on May 1st, 1911, must be quashed.

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Conviction quashed.

S. M.

ALFRED EDWARD BRADSHAW, JAMES FREDERICK BEACHAM, AND JOHN WILLIAMS.

Alfred Edward Bradshaw, James Frederick Beacham and John Williams.

Severity of sentence. Sentences reduced in view of inaccurate police evidence.

These were three appeals against sentence by leave of Scrutton J., and an application for leave to call further evidence in the case of Williams. Bradshaw had pleaded guilty to four indictments for housebreaking, Beacham had been convicted of receiving some of the property stolen from one of the houses, and Williams had pleaded guilty to two indictments for receiving some of the property stolen from two of the houses.

Bradshaw was sentenced at the Middlesex Sessions on May 6th, 1911, by the Chairman to four consecutive terms of five months' imprisonment with hard labour (making twenty months in all), Beacham was sentenced to twelve months' imprisonment with hard labour, and Williams to two consecutive terms of nine months' imprisonment with hard labour (eighteen months in all).

Linton T. Thorp for appellant John Williams, who was present. This appellant is only 21 years old, and has never been previously convicted, and had a good character. The sentence is too severe. The learned Chairman was influenced by the wrong information supplied to him by the police. He was told that this appellant was married in June, 1910, that he failed to support his wife, and that when she was about to be confined he went to her room and stole her watch and chain and pawned them, and threw the tickets at her afterwards. It was further stated that his parents were unable to say one word in his favour. His wife was in court at the trial, and was anxious to contradict these statements, but by some misunderstanding was prevented

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from doing so. Appellant, however, informed the Chairman that his wife was in court, and could prove that he never stole the watch and chain. Leave was asked to call appellant's wife and father, and to put in evidence of three years' "very good" conduct at sea.

The Court gave the necessary leave, and the wife and father gave evidence. The wife swore that she never had a watch-chain, but that she asked her husband the appellant to pawn her watch, that he pawned it for 3*s*. 6*d*. as requested by her, and he gave her the ticket, and she had no complaint to make against her husband or his parents. The father gave the son a good character, and denied that he ever said, and it was not the fact, that he could not say one word in his favour. Inspector Davis also gave evidence.

Thorp submitted that if this evidence had been before the learned Chairman he would not have passed so severe a sentence. He was also mistaken in regarding this appellant as a ringleader. There were three other prisoners included in the indictment, and one of them, Gandolf, who pleaded guilty to one indictment and was bound over in his own recognizance of £10, was a much older man, and the difference between his punishment and appellant's was only explicable on the supposition that the Chairman had been misled by the police evidence, which was now contradicted.

The appellants Bradshaw and Beacham were not legally represented, but they said they had good characters, and had never been convicted, and their sentences were too severe.

Purcell, for the Crown: The appellants were indicted with three others, and the charges against them consisted of breaking into four separate houses, all in one month (March 13th, 19th, 26th and 28th). From one house £450 worth of property was stolen, and from another £95 worth was stolen. In both these cases the appellant Williams pleaded guilty to receiving, and the appellant Bradshaw to housebreaking, and Bradshaw also pleaded guilty to two other cases of housebreaking. These cases of housebreaking are very common in Middlesex, and it has been the practice of the Court to regard them as offences of exceptional gravity, and as there are not sufficient police in Middlesex to keep watch on unprotected houses, the only way to check this

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crime in Middlesex is by making it known that it is punished with severity.

PICKFORD J.: The Court has to consider whether or not the sentences passed upon the three appellants are too severe. All three were men of good character, and none of them had been previously convicted. Bradshaw is 19 years old, Beacham is 20, and Williams 21. Bradshaw is reported as not suitable for the Borstal treatment for the somewhat extraordinary reason that his character is too good, and his circumstances and surroundings are not such as to tempt him to crime. The reason assigned by the Commissioners for not accepting Beacham for Borstal treatment is that he is physically unfit. Bradshaw pleaded guilty to four cases of housebreaking, all in the month of March. Beacham was convicted of receiving property, a portion of the proceeds of breaking into one of the four houses. Williams has pleaded guilty to receiving property, a small amount it is true, but part of the proceeds of the thefts from two of the houses. The evidence given by Inspector Davis with regard to the character and previous history of the appellant Williams was not in his favour, and in some respects was not quite accurate. It was based upon information received, but the information was not first-hand. We have, however, heard Inspector Davis, and are satisfied that proper steps were taken to obtain the required information, but unfortunately, in consequence of the police official not being able to see personally the father and wife of the prisoner Williams, he went away with some inaccurate information supplied by a member of the family. We are of opinion that the Chairman was induced by the statement of Inspector Davis, part of which was inaccurate, though strictly in accordance with the information supplied to him, to pass a severer sentence on Williams than he would have done otherwise. After carefully considering all the circumstances of this case, we have come to the conclusion that there ought to be a reduction in these sentences, but in deciding to reduce the sentences in this particular case, we do not wish in any way to minimise the seriousness of systematic crime of this kind in the county of Middlesex, or disapprove in any way of the view taken by the magistrates that the crime of housebreaking must be punished with severity.

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The sentence on Bradshaw will be twelve months' imprisonment with hard labour on each of the four indictments, the sentences to be concurrent; on Beacham, nine months' imprisonment with hard labour on the one indictment on which he has been convicted; and on Williams, nine months' imprisonment with hard labour on each of the two indictments, the sentences to be concurrent.

Sentences reduced.

Solicitor for the Appellant Williams—*Percy W. Taylor.*

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BANKES.

MARY ANN NASH.

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Murder.

A jury are entitled to infer that there has been a violent death from circumstantial evidence.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact. Appellant was convicted at Salisbury Assizes on June 1st, 1911, before Lord Coleridge J. of the murder of her illegitimate son, and sentenced to death.

Rayner Goddard for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was charged with the murder of her illegitimate son, aged five years and nine months, on June 27th, 1907. The body was discovered in a well at Burbage in April, 1908; an inquest was then held, quite close to the scene of the alleged murder and to the place where appellant was then living. The features were unrecognisable, and decomposition was very advanced. At that time no evidence was forthcoming and no suggestion was made against appellant. In October, 1906, appellant removed the child from the care of her father and placed him with a Mrs. Mary Stagg, at Pewsey. She got behind in her payments, and on May 29th, 1907, he was removed to a Mrs. Emma Stagg at Aughton, with whom appellant was herself then living. On the way the child was taken for a rest to the cottage of a Mrs. Sherwood, which overlooks the field where the well is in which the body was afterwards found. Mr. Stagg objected to keeping the child, and one or two days after June 26th, 1907, appellant took him away, saying she was

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going to the house of a Mrs. Hillier, near Marlborough. She returned the same evening without him, after an absence of about twelve hours, and then and on several other occasions stated, untruly, as was admitted at the trial, that the boy was at Mrs. Hillier's, alive and well. Mrs. Sherwood said that three or four weeks after the child was at her house she met him walking on the Aughton side of her cottage, *i.e.*, going from Mrs. Stagg's house towards the well, and beyond that in the direction of Marlborough, and that he was accompanied by a woman whom she could not identify, but who was tall; appellant was only 5ft. 4in. The only passage complained of in the summing up was that in which Lord Coleridge J. told the jury that they might legitimately infer that appellant was the woman. In December, 1907, two workmen, looking into the well, saw something floating, which they took to be a dog; they could touch the water with a stick. They saw nothing else; no doubt the well was wider down below than at the aperture, which was eighteen inches in diameter. The remains of a dog were afterwards found in the well. The evidence was that if the body of the child was put in the well in June, 1907, it must have been floating by December. In April, 1908, it was found by two other workmen; although a doctor was called in, he made no *post mortem* or other careful examination. There was no evidence even as to sex except from the general appearance and dress. There was nothing to shew whether death was natural or violent, nor whether it occurred before or after the body was put into the well. It was conceded that a child of five or six years could lift the well cover, and might therefore have fallen in accidentally.

In proof of a charge of murder the Crown must establish two things: (1) the identity of the body with the person named in the indictment; (2) that that person was killed by the prisoner. Only then is the onus shifted on to the defence to shew that the killing was lawful, or amounted only to manslaughter.

As to identity, the submission that there was no evidence was not pressed at the trial, but the evidence was very weak. The age was 5 years and 9 months; three medical witnesses put that of the body as between the ages of five and seven; the only doctor who saw it at the time put the age first between nine and thirteen, and never below six and a half. The clothes were not of the same

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colour as that deposed to by any of the witnesses who saw the boy. The boots were far too large for a child of that age.

As to the cause of death, Lord Coleridge J. ought to have withdrawn the case from the jury. It was, no doubt, a case of grave suspicion against appellant, because of her false statements, persisted in up to her arrest, but that is no evidence of killing. Where there is no evidence of violent death, the Court is only justified in submitting the case to the jury if every other possibility is excluded. In recent cases under the Workmen's Compensation Act, where seamen have been found drowned, the Court has refused to presume accidental death, because suicide is not excluded. Counsel cited Foster's Crown Law, 3rd ed., p. 255; Wills on Circumstantial Evidence, 5th ed., p. 291; *Evans* v. *Evans*, 1 Hagg. C. C. at 105 (1790). In former times the Crown had to allege and prove the means by which a murder was committed, and any variance was fatal. That is now unnecessary, but the fact of killing must still be established, and in this case there was no evidence of it to be left to the jury.

S. H. Emanuel, for the Crown, was not called upon.

The Lord Chief Justice: It has been submitted that there was not sufficient evidence to go to the jury (1) of the identity of the body, and (2) of unlawful killing. As to the identity, counsel was no doubt right in admitting at the trial that there was some evidence; his argument must be that it was not sufficient to justify the jury in convicting. The facts which are undisputed (because appellant did not give or call any evidence), are that on the morning of the 27th of June, 1907, the appellant left with the child, saying that she was going to Mrs. Hillier's; that she would pass near the well where the body was found, and that a woman was seen there with the child on a day about that time. Alone those facts might not be sufficient, but she left with the child in perfect health, and when she returned she said she had left it with Mrs. Hillier; she packed up its clothes and said she had sent them to her, and later she said that the child was well. All these statements were untrue. She had an object in getting rid of the child, and if it had been lost or met with an accidental death, she had every interest in saying so at once. It is said there is no evidence of violent death, but we

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cannot accept that. Mr. Goddard cannot have meant that there must be proof from the body itself of a violent death. His argument means that on the whole evidence the possibility is left so open that it was not safe to leave it to the jury. But the facts which were proved called for an explanation, and beyond the admittedly untrue statements, none was forthcoming. Mr. Goddard suggests that the evidence is consistent with the child having been given to gipsies or such like people, but the jury cannot assume such a hypothesis without evidence. The possibility of accident was referred to in the summing up, which has not been attacked. In view of the facts that the child left home well and was afterwards found dead, that the appellant was last seen with it, and made untrue statements about it, this is not a case which could have been withdrawn from the jury.

Appeal dismissed.

A. S. C.

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NINA VASSILEVA.

It is a misdirection to fail to point out to the jury that an alternative innocent interpretation may be put on the proved facts.

Appellant was convicted at the Central Criminal Court on May 12th, 1911, after a trial lasting eleven days, before Grantham J., of conspiracy with other defendants to commit a burglary in a jeweller's shop in Houndsditch on December 16th, 1910, and was sentenced to two years' imprisonment.

Walter Stewart (with him *Lionel Leach*), for the appellant, who was present. Appellant was indicted for the conspiracy with seven men, of whom three were dead, one had absconded, and three were tried and acquitted. The principal conspirer was no doubt one Gardstein, with whom appellant was living at 11, Exchange Buildings, Houndsditch, and the real issue for the jury was whether she knew of and participated in the criminal design. On that point there was, it is submitted, misdirection by Grantham J. The evidence against her was equally consistent with her being there as a conspirer or merely

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for the performance of domestic duties, without knowledge, or at least without participation in the crime. The learned judge repeatedly put it that if the jury believed the witnesses for the prosecution they must convict. At the trial the double defence was set up, that it was not satisfactorily proved that appellant was in Exchange Buildings at all, and if she was, there was nothing to shew that her presence was guilty. The evidence for the prosecution was that up to three weeks before December 16th appellant was lodging with some people named Gordon in Buross Street, that she was a perfectly respectable girl in good employment; that she left, giving a false reason; that when she left she dyed her hair; that afterwards she was seen apparently living with Gardstein at 11, Exchange Buildings up to December 14th; that there were some instruments used for the purpose of breaking into the jeweller's shop in Houndsditch found in that house, but that the bulk of them were found, and the operations were carried on, at No. 9, where appellant was never seen to go; that after December 14th she disappeared, and except for a witness named Levy, who said he saw her on the night of December 16th assisting to carry away Gardstein, who had been fatally wounded in an affray with the police, no one saw her again until some days after the attempted burglary, and Levy's evidence was generally discredited; that she then returned to Mr. Gordon's, and gave a false account of her movements; that she destroyed some papers, and others fell into the hands of the police, but turned out to be seditious pamphlets having no connection with the burglary; that she attempted to induce a witness to make a false *alibi* for her, and that on arrest she made a false statement to the police. At the trial she neither gave nor called evidence to disprove or explain these matters. She had nothing to do with the hiring of the premises, either No. 11, where she lived with Gardstein, or No. 9, from which the attempt at burglary took place, though Grantham J. wrongly informed the jury that she had. On the night of December 16th the attempt was made to break into the shop from No. 9, which was at the back. The burglars were interrupted by the police, and immediately shot some of them, and also Gardstein, one of their own number, but there was no evidence that appellant was there on that night. The evidence was not conclusive, and unless the jury were warned that there was an innocent inter-

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pretation which they might put upon it, the conviction cannot stand. The effect of the summing up is just the contrary. Counsel referred to certain passages, which are set out in the judgment of the Court.

Bodkin for the Crown. A charge of conspiracy must in almost every case be a matter of inference from constant and close association of the conspirers, which is most convincing if it is upon the scene of the crime. Appellant was constantly seen at No. 11, and although that was an apparently respectable residence, while No. 9 was the business premises, there was access at the back, which she could easily have used. It is true there was no evidence of her hiring the house, but Grantham J. meant merely that she was in occupation of it. Nor was there evidence of her buying the tools which were used (a very large quantity) in the attempt, but she must have seen them brought in, and known their purpose.

[BANKES J.: If Gardstein said to her, "Come and live with me; I am going to commit a burglary, but you need take no part in that," and she came with that knowledge, and took no active part, would she be a conspirer?]

Technically, yes; but if that had been all she would not have been charged. Here she played the part of an ordinary mistress of a house, but was, in fact, purposely giving the appearance of reality to premises which she knew were being used as the base of operations against the jeweller's shop. Although certain passages in the summing up do not put fully before the jury the question whether the presence of appellant was guilty or innocent, this is largely accounted for by the fact that right up to the end her counsel persisted in disputing the evidence that she was ever there at all. On the other hand, in other passages Grantham J. clearly explained to the jury the true issue. [These passages are set out in the judgment.] Moreover, in a trial lasting eleven days, the jury had carefully followed the bearing of the evidence, and the issue had been most fully put before them by counsel on both sides. Unless the summing up was of a character to mislead the jury, so as to distract their minds from one of the issues, the verdict

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cannot be disturbed; *Stoddart* (1909), 73 J. P. 348; 25 T. L. R. 612; 2 Cr. App. R. at 246: "Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by counsel for the prosecution and for the defence respectively."

Stewart, in reply: The effect of the whole summing up is to impress upon the jury that if appellant was proved to have been at 11, Exchange Buildings they must convict her. All that was urged by the defence upon the question of her presence at Exchange Buildings was the fact that the onus of proof rested upon the Crown to establish this to the satisfaction of the jury, and the Crown mainly relied upon the very same witnesses as those who were proved to be mistaken in their evidence concerning the acquitted defendants. As to the point of her guilty knowledge being necessarily or properly to be inferred from her presence at No. 11, Exchange Buildings, and the presence there on the night of December 16th of certain articles now said to have reference to the intended burglary, it was never proved that she was there when those articles were in the place, and even if it had been proved, what would this amount to? Were the articles of a nature to indicate to the mind of this girl that they could only be required for an illicit purpose? She was not a trained burglar, but a cigarette maker.

The Lord Chief Justice: This is a case of very great importance, one of the most difficult which this Court has had to consider. The trial lasted eleven days; there were three prisoners besides the appellant, whose cases had to be carefully distinguished. There was evidence which could not be withdrawn from the jury, and after a long trial the summing up is criticised from a point of view which very possibly did not present itself so strongly to the learned judge, and was no doubt lost sight of from the way in which the defence was conducted. I repeat what I said in *Stoddart's* case. It is not to be supposed that this Court approaches a summing up, especially after a long case, without regard to the way in which the case was carried on in the Court below. As Lord Esher said, omission is not of itself necessarily misdirection; it is only when the omission is such as is calculated to mislead the jury that it amounts to misdirection. This Court

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has now been sitting more than three years, and has done useful work at all events in one direction, in pointing out the necessity for calling the attention of the jury to the law bearing upon the issues raised in a case; it does not sit to re-try a question of fact properly left to the jury, as to which there was substantial evidence. There are practically no cases where this Court has interfered where evidence has been properly received and left to the jury with a proper direction, and there has been no improper conduct of the trial. We have to be careful that we do not put ourselves in a position of superiority over the judge at the trial, and decide on some point that was not really raised before him. If we were merely being wise after the event, we should not interfere. It is only fair to a judge of great experience to say that he may have been misled by a false issue persistently raised by the defence. We do not criticise counsel, who are often misled by false instructions, or by the difficulty of their case, but when it is evident to a defending counsel that he is not going to call the prisoner, it is most unwise to contest every piece of evidence and insist that facts as to which there is clear evidence are not established. In this case we should not interfere if the summing up had pointed out the possible alternative of innocent interpretation being put upon the proved facts.

There was a wicked plot by some men, of whom Gardstein was one, to break into the premises in Hounsditch which backed upon Exchange Buildings. On the evening of December 16th they tried to bore a hole through the wall; they were interrupted, and several police officers and Gardstein were shot. Everyone in any way connected with these occurrences was naturally afraid of being charged with being concerned in the murder, to say nothing of the burglary. No doubt there was evidence which the jury had no right to disbelieve, that the appellant was for some days living at 11, Exchange Buildings, doing the ordinary work of the mistress of the house. There were brought to that house some implements useful for committing a burglary. A larger quantity was at No. 9. Who were the people at No. 9 it is not necessary to consider. There is no evidence that appellant did anything in No. 9, or took any actual part in the burglary. It appears from the report of the summing up that Grantham J. told the jury she was implicated in the "hiring," as distinguished from the occupation of the house. Of this there was no evidence. Whether

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she was present on December 16th when Gardstein was being assisted in the street is not of great importance, though there was some evidence of it. Beyond her presence at No. 11, and the presence there of some burglarious implements, there was no direct evidence of conspiracy. She seems to have been a respectable girl up till a short time before she went there, earning her living as a cigarette maker. Unfortunately, she fell in with Gardstein; it does not matter whether she was his wife or his mistress, except for this: much was said about her dyeing her hair and about the lies which she told. As to her false statements after the affair it must be remembered that she might then have ground for thinking that she would be accused of participation in these dreadful murders. One ought to be very careful of drawing false inferences in such circumstances; a person with more knowledge than appellant may well have thought that she would be punished if found to be in any way connected with those murders. As to the dyeing of the hair and the lies told, before she left her lodgings she was a respectable girl, and having decided to live with this man, may well have wished to conceal her identity. The point of view from which such questions must be regarded is—are there other alternatives consistent with this evidence which do not necessarily point to guilt? In such a case, which had been long and strenuously fought, and where issues had been raised which might mislead the jury, it is most important to correct such errors. But the learned judge said more than once that if the jury believed the facts proved by the prosecution the appellant must be guilty; there is no sufficient recognition of the fact that there might be an innocent interpretation. The learned judge said: "There is this evidence against her—damning evidence against her, if you believe it—that she was living at 11, Exchange Buildings, and that she was not at home, at the time she said she was at home. No answer to that! . . . . You have got so many points of identity in the evidence all working together to a common centre with regard to her conduct in this matter both before and after these murders, that it does seem to me very difficult indeed to bring any defence for her at all as to whether or not she was concerned in this conspiracy." That is, in effect, a direction to the jury that if they believed she was living there, it was strong evidence of conspiracy, and that they

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would not be able to see what defence there could be to the charge. Later, no doubt, he said: "You see, to prove a charge of conspiracy you must prove a combination amongst persons to carry out a certain crime, and some participation by the parties charged in the preparation of the crime. The mere knowledge of one person that another is about to commit a crime is not a conspiracy if they take no part in it at all." That, I agree, is perfectly correct, and if it were clear that it referred to the appellant, it might have been sufficient, but the context shews that it was applied mainly to the three male prisoners. From the possibility that being there keeping house, she would have seen these articles, it does not by any means follow that she must have known the purpose for which they were to be used. Again, he said: "What you have to determine is whether she was in this house during the weeks before, and assisting in carrying out the robbery in the way I have suggested by being a participator with Gardstein." That passage has been relied upon for the Crown, but it does not seem to us sufficient to remove the impression which may have been raised in the minds of the jury by the other passages to which reference has been made. The following has also been relied upon, dealing with the statements she made after the crime: "I do not think you can have any doubt that her statements were all lies, and she did know what was alleged had been done. That being so, it seems to me very difficult for you to say that she was not directly implicated in this conspiracy to rob—that is, helping Gardstein and whoever was implicated with him in carrying out this crime." But it does not seem to us that it is proper to draw an inference of guilt from knowledge after the event. We have read the whole summing up more than once to see if there was any passage which even indirectly pointed out to the jury that appellant might have been in that house without knowing of or taking part in the conspiracy. The effect of it, taken as a whole, is to impress upon the jury that the fact of her being there and giving no answer in the witness-box was sufficient to satisfy them that she must have been involved in the conspiracy; and the passages relied on for the Crown are not sufficient to remove that impression. We are not here to express an opinion whether she is innocent; we have to decide whether there has been a satisfactory trial. We have carefully considered the proviso to s. 4, and we

have come to the conclusion that the fact of her living there is not sufficient of itself to convince us that she was participating in the conspiracy. It was a question for the jury; we cannot say that if properly directed they would have convicted her.

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Conviction quashed.

A. S. C.

Solicitor for the Appellant—*T. E. Crocker.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

WILLIAM HENRY PALMER.

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William Henry Palmer.

Murder. Circumstantial evidence.

This was an application for leave to appeal against conviction, and for leave to call further evidence.

Applicant was convicted at the Leicester Assizes on June 13th, 1911, of having wilfully murdered Ann Harris at Walcote, Leicestershire, on January 25th, 1911, and was sentenced to death by Pickford J.

Bernard Campion for the applicant (under s. 10 of the Criminal Appeal Act), who was present. The murder took place at Walcote, near Lutterworth, in the early morning of January 25th, and the prisoner was arrested at Folkestone on January 28th. The theory of the prosecution was that they had proved that applicant was sufficiently near the place to have committed the crime, that he had little or no money before the murder, but a considerable sum, including a large number of threepenny pieces, was in his possession after the murder. The murdered woman was known to have had a hobby for collecting threepenny bits, and forty-three of these coins were found in her cottage at the time of her death. Applicant was also seen on January 25th going to the lavatory of the Central Hotel, Rugby, and some months after in the cistern of that lavatory were discovered some articles stolen from the murdered woman. The prosecution also alleged that applicant gave incorrect accounts how he spent the crucial time, *i.e.*, the time between midnight, January 24th, and 5 a.m. January 25th. The evidence was purely circumstantial, and it

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is submitted that the verdict of the jury was against the weight of evidence, and that the circumstances relied on even in their cumulative effect did not amount to more than suspicion. First, the identification is very unsatisfactory; it depended entirely upon the evidence of an old woman in her seventieth year, whose sight was not as good as it used to be, and who professed to be able to recognise a man whom she saw only once through a pane of glass at midnight, when he was forty feet away. She purported to pick him out from his build, not from his face, which, she says, she did not see plainly, as only the light of a match shone on his side face. Secondly, he was not without money before the murder. The witnesses called by the prosecution proved that he was spending money, and had money to spend immediately before the murder. Thirdly, the acts of the applicant are inconsistent with those of a guilty man. On January 25th he shewed himself openly at the Central Hotel, Rugby, one of the largest and busiest hotels, where he made no attempt whatever at concealment. Instead of going straight to London from Lutterworth with his ticket for London, he stopped at Rugby. He sent a telegram in his own name to Manchester. He sends another telegram at Charing Cross Station and openly booked for Folkestone, where he went to see some relatives. He made no attempt to conceal his movements. If the illeged incorrect accounts of what he did between January 24th, midnight, and 5 a.m. on January 25th are examined, it will be seen that they are due merely to omissions which applicant thought immaterial, and as to many points the errors were corrected in further statements immediately afterwards.

With regard to the threepenny bits, the prosecution proved that forty-three were found at the murdered woman's cottage, and no proof was given that she had any more, or that any were missing.

On the above facts alone it was hopeless for the prosecution to expect a conviction, but on June 7th, five days before the trial, notice of further evidence was given to applicant and the solicitor at that time instructed by him, and it was this additional evidence that secured the conviction. Without it, it is submitted, the adverse verdict could not have been given. This evidence was that on the 3rd June a gold chain, a gold-rimmed eye-glass, a piece of leather said to be part of a purse, and a lady's

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gold watch were found in the cistern of the lavatory at the Central Hotel, Rugby. It is not contended that these articles were not the property of the murdered woman, since the evidence to that effect was strong, but it is contended that there was no evidence that the applicant was ever in possession of them. The prosecution suggest that he put them in the cistern on the morning of January 25th, when he broke his journey to London at Rugby and visited the lavatory. The applicant was arrested on the 28th January, but the articles were not discovered until the 3rd June, on the very eve of his trial. But immediately after the murder the fact that the applicant had visited this particular lavatory and the fact that these actual articles were missing were published broadcast, and were known throughout the district. The long interval that elapsed before their discovery gave ample opportunity for the guilty person to place the articles in the lavatory cistern—the lavatory being open to all callers at that busy hotel—with a view to further securing conviction of the applicant, and so saving himself. But what is more important is that the condition of the watch was proved at the trial, by a witness called by the applicant, to be such that it could not have been in water for the time that had elapsed from the prisoner's visit to the discovery on 3rd June. There were only two jewellers called—one by the prosecution, the other for the defence. The former said the condition might have been produced in two months, the latter positively asserted that the condition (particularly of the hair spring and small steel parts) must have been very much worse had the watch been in water for four months. The verdict was influenced by the discovery of this watch, and was against the weight of evidence. It is submitted alternatively that further expert evidence on this point is desirable. Applicant is informed that he can obtain expert evidence to the effect that the condition of the watch found in the cistern is quite inconsistent with its having been in the cistern for a month or more than a month. At the trial applicant was able to call only one witness on this point, the only one procurable by his then solicitor in the short time at his disposal. Applicant asks to be allowed to call this further evidence, and he further asks the Court to exercise its power under s. 9 (*e*) of the Criminal Appeal Act, 1907, and appoint a person with special expert knowledge on the subject to act as assessor to the Court.

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Sir Ryland B. D. Adkins and *Drysdale Woodcock*, for the Crown, were not called upon.

The Lord Chief Justice: We have listened to an extremely able and clear argument, but it is impossible for us to say either that there was no evidence upon which the jury might have come to the conclusion at which they have arrived, or that they have come to a wrong conclusion. If we had had any doubt, we should have given leave to appeal so that the question might be further argued. No objection whatever is taken by Mr. Campion to the summing up by Pickford J.—on the contrary, he says it was extremely fair. The undisputed facts of the case are that Ann Harris, an old woman of seventy-four, was found strangled on the morning of January 25th last, and that many articles were stolen from her cottage, including a gold watch, chain and money. She had a hobby for collecting threepenny bits, and forty-three of these coins were found in her cottage after the murder, and also one purse in which some gold was left. The evidence for the prosecution shewed that the prisoner was in possession of a great many threepenny pieces. He made some payments with these coins, and he was proved to have kept ten or twelve of them wrapped in paper, and he accounted for having so many of them by saying that he was a drover, and that his boss had paid him in threepenny bits the previous day. It is true that the prisoner had denied this to a police officer, but at the trial he did not go into the witness-box, and it was for the jury to consider the evidence as given, and form their own conclusion. From the evidence for the prosecution it was not necessary to draw the conclusion that the prisoner was absolutely without money. It is true that on the evening of January 24th he was tramping about and begging for coppers, and for money for a night's lodging, but that is quite consistent with his having some money to spend in a public-house. No attempt, however, was made on behalf of the prisoner to shew that he had, on the day before the murder, the comparatively large sums which admittedly he possessed on the day after the murder.

With regard to the identification, there was ample evidence for the jury. Admitting in the prisoner's favour all the points made by Mr. Campion, that Mrs. Gibson was an old woman, and was looking through a pane of a window, at the

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prisoner who was forty feet away, her identification cannot be easily disregarded. It was made with great deliberation and care, and without hesitation. She recognised him from his build generally, as well as from his side face and moustache, and it was for the jury to decide whether or not they were satisfied with her identification. Pickford J. was careful to put before them all the points now relied on by Mr. Campion as casting doubt on the sufficiency of the identification. On the morning after the murder there was abundant evidence of his being distinctly flush of money, and he was in possession of a large number of threepenny bits. The porter at the railway station said the prisoner pulled out a handful of silver, and he purchased various articles with threepenny bits. We are of opinion that on this point also, the sudden change of the prisoner's condition with regard to money, there was evidence for the jury. At the trial the prisoner did not go into the witness box, and no comment was made by the learned judge on his omission to give evidence. But, although there is no obligation on an accused person to give evidence on oath when the evidence against him may be doubted or discredited, in this case we cannot see that any doubt or discredit was in fact thrown upon the evidence of the prosecution. The untrue accounts that the prisoner gave where he spent the time between January 24th midnight, and 6 o'clock of the morning of January 25th, were also properly left for the jury to consider. Prisoner's statement that he went straight from Lutterworth to London was untrue, he had in fact stopped at Rugby. The evidence as to the discovery in the cistern of the other articles stolen from the murdered woman was properly admitted, and we cannot see that the prisoner has any right to complain on the ground of surprise. He did call one witness on this point at the trial, and even now we are not told the names of any further witness or the nature and details of the new evidence which it is hoped to produce. We cannot help thinking that there was ample evidence for the jury, and we must therefore refuse this application.

Application dismissed.

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JOHN GRAY.

Evidence of answers to enquiries made at the request of the defendant must be limited to those answers: other matter elicited by the enquiries is inadmissible.

If a letter is (though irregularly) quoted in the course of the trial, statements in it favourable to the defendant as well as those against him should be read.

This was an appeal against convictions, by leave of Grantham J., and also an appeal against sentence and an application for leave to call further evidence.

The appellant was convicted on June 3rd, 1911, at Reading Assizes on a charge of false pretences, and also on a charge of being a habitual criminal, and was sentenced by Lawrance J. to four years' penal servitude, to be followed by five years' preventive detention.

F. W. Sherwood for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The charge against appellant was that he obtained, on August 20th, 1910, goods to the value of 11*s*. 3½*d*. from the Windsor District Co-operative and Provident Society, and money to the amount of £5 8*s*. 8½*d*. by false pretences, *i.e.*, by representing that a document he produced was a genuine seaman's advance note for £6, whereas it was a valueless piece of paper. The appellant was not arrested until January 21st, 1911, and he at once denied that he had anything to do with the alleged offence. He said he was on the steamship *Lavinia* at the time of the alleged offence, that he joined her on August 5th, 1910, and did not leave her until Christmas. His discharge shewed that he had served on the *Lavinia* from August 5th to December 26th, but this was a mistake, and in fact he had served from September 8th to December 20th. On January 24th, before he had been told of the results of the enquiries made by the police as to this, appellant said that the discharge was wrong in its dates, and that he was on the *Lochmore* from August 8th to September 1st, and this latter statement was true, and covered the date of the charge, August 20th. What is complained of is that the Crown laid before the jury hearsay evidence given by the police, that other people (who

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were not called) had pronounced the discharge to be a forgery; the Crown was only entitled to say that the discharge had been found to be inaccurate, which the appellant himself admitted.

[AVORY J: That evidence was clearly inadmissible; why was it not objected to?]

Prisoner was undefended; he admitted the inaccuracy of the discharge, but he denied it to be a forgery.

[AVORY J.: The appellant was being tried in effect for a forgery, and here another charge of forgery is introduced.]

Not only were charges of forgery introduced, but the Chief Constable of Windsor gave evidence of a conversation between appellant and himself, in which the appellant admitted the forgery of two other quite irrelevant documents. As to the appellant's defence of an *alibi*, it was just physically possible to go from Liverpool, where the *Lochmore* was stationed, to Windsor and return in a day, but impossible to do so without being missed; it was therefore desirable to prove that he was not absent from the ship on August 20th, and this appellant attempted to do by making use of a letter from Roberts, the officer of the ship. He obtained this letter while he was in gaol; it was obviously genuine, and he naturally thought he would have the benefit of it. Strictly speaking, that letter was not evidence, and its exclusion cannot be complained of. But although the letter was excluded, certain extracts from it which were supposed to tell against appellant were made use of by the learned judge: the letter from Roberts stated that the writer was sorry he could not help him with regard to August 20th, as on that day he was away from the ship to see a cricket match, and could not say whether or not appellant was away from the ship on that day, but he could say that appellant was not away from the ship on any other day that month. The jury were told that Roberts could not help appellant with regard to the date, August 20th, but it turned out from a letter received in gaol from the secretary of the cricket ground that the date of the cricket match was not August 20th, but August 27th, and Roberts was accordingly able to say that appellant was not absent from his ship on August 20th. It was unfair of the

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prosecution, knowing of these letters and knowing that they must be genuine, and that the appellant relied upon them, to allow him to be convicted without having the writers in attendance. I also take objection to several questions in chief put to the witnesses for the prosecution, the object of which was to shew that appellant had been guilty of other forgeries. Again, appellant had done nothing in the course of the trial to expose himself to the kind of cross-examination to which he was subjected; he was cross-examined both about forgeries which he admitted, and forgeries which he denied, and none of them had anything to do with the charge on which he was being tried.

The summing up of Lawrance J. failed to point out to the jury that the onus lay upon the prosecution of shewing that the prisoner was or might have been away from the *Lochmore* on August 20th, the prisoner's defence was never fairly placed before the jury; for instance, he was in gaol when the series of the utterings of the forged advanced notes (which was shewn to be going on) began, and in gaol again before they ceased; this fact was obscured. As to the conviction for being a habitual criminal, there were similar objections to be made; hearsay was admitted to shew that there were other charges pending against him, which he denied; the fact that he had been several months in honest employment just before his arrest was ignored; there was no proper summing up, and the learned judge seriously embarrassed him, unintentionally no doubt, by saying to him when he began his defence that there was no need for a long speech; and so he made none at all.

[He was stopped by the Court.]

H. M. Sturges for the Crown. When a prisoner asks a police officer to make enquiries and obtain information from another person on a matter which the prisoner considers material to his case, the statements made by that other person may be used as admissions against the person who referred to him. See Stephen's Law of Evidence, 6th ed., art. 19, p. 29.

The Lord Chief Justice: The appellant, John Gray, has been convicted on two charges: (1) of obtaining goods by false pre-

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tences, *i.e.*, by means of a valueless seaman's advance note; and (2) of being a habitual criminal. We are of opinion that the trial was not satisfactory. The appellant was defending himself, and in the course of his defence made many statements that were both long and rambling. In such a case the prosecution must be very careful not to tender, or bring out by cross-examination, evidence to which objection can be taken. A similar responsibility rests upon the judge at the trial. In this case the real point to be decided was the identity of the appellant with the man who, on August 20th, obtained the goods and money by false pretences. The appellant obtained a certificate of discharge from the *Lavinia*, this stated that he had served on the *Lavinia* from August 5th to December 26th. It is clear that he did not obtain this certificate until December 26th at the earliest, and probably many days later. There was a mistake in the date of the commencement of his service, it should have been September 8th instead of August 5th, but the appellant was not proved to be in any way responsible for that mistake. Appellant also said he was on the *Lochmore* all the month of August, and that he left the *Lochmore* to join the *Lavinia*. This statement was made as a kind of supplement to, and not as a correction of his first statement. Prisoner asked for certain enquiries to be made, and although it may be that in some cases the result of those enquiries may be given in evidence, evidence of further facts obtained as a result of those enquiries, which facts are not a direct answer to those enquiries, is not admissible. This further evidence in this case was improperly admitted. Two further certificates were found on appellant, and the Chief Constable, by cross-examining the appellant, elicited that they were forgeries. There was no justification for giving these facts in evidence against the appellant. They would materially prejudice the jury against him, and in this case there was the greatest necessity for care as it is clear that similar forged advance notes had been presented for payment over periods of time when the prisoner, owing to his being in prison or for other reasons, could not have been a party to the frauds.

The learned judge did not caution the jury, as he should have done, against being prejudiced by the statements made with regard to the two certificates—the *Lavinia* and *Toward* certificates—being forgeries, and he did not point out that affirmative evidence should have been given of the absence (actual,

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John Gray.

probable, or possible) of the appellant from the *Lochmore* on August 20th. We are not satisfied with the way in which Roberts's letter was used. It was used solely against the appellant, and the jury were told distinctly that it did not help him, whereas in fact, certain portions of it were materially in his favour, when once it was shewn that the cricket match was on August 27th and not on August 20th. The jury were not cautioned as to what the real issue was, and they were not told that the evidence must satisfy them that the appellant was away from the *Lochmore* on August 20th. We are of opinion that, both on the ground of misreception of evidence, and of absence of direction to the jury on material points, this conviction must be quashed. We have not heard out the arguments on the objections taken to the conviction for being a habitual criminal. This conviction must necessarily be quashed if the conviction for false pretences is quashed. There is another indictment against the appellant on the file, viz., for forgery, and as the Crown (we understand) have now decided to proceed with this indictment the appellant will be remanded on his own recognizance in the sum of £50 to appear at the next assizes at Reading to answer such indictments as shall be preferred against him.

Convictions quashed.

S. M.

Charles Simmonds.

CHARLES SIMMONDS.

Severity of sentence.

This was an appeal against sentence pursuant to leave granted by Avory J. The appellant pleaded guilty at Worcester Quarter Sessions to stealing an under-vest and pair of drawers, and was sentenced on June 8th, 1911, by the Chairman to five years' penal servitude.

The Appellant in person. The sentence is too severe, considering the small value of the things I stole. If you will reduce the sentence I promise to go straight in the future.

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Hon. R. W. Coventry for the Crown. Although the appellant is only 24 years old, there are ten previous convictions recorded against him, and in June, 1908, he was sentenced to three years' penal servitude. The learned Chairman in his judgment gave his reasons for imposing so severe a sentence.

The Lord Chief Justice: We fully recognise that the learned Chairman who passed this sentence is a judge of great experience, and we have accordingly given careful consideration to and appreciate the reasons which he expressed in his judgment for imposing this sentence of five years' penal servitude. Undoubtedly it is very difficult to discover the most satisfactory way of dealing with criminals like the appellant. His offences commence from the time when he was 10 years old, he has been discharged on account of his youth, he has been bound over twice, sent to a training ship for five years, and has served sentences of three months', nine months' (twice), and twelve months' hard labour, and also three years' penal servitude. The appellant has to-day made a promise in open court which will be recorded against him, that he will go straight and lead an honest life in future if his sentence is reduced. Having regard to the appellant's youth, the circumstances of this last offence—the stealing of clothes of trifling value, which he threw away and did not sell—his previous punishments, and the promise he has made to-day, we have decided to reduce the sentence to twelve months' imprisonment with hard labour.

Sentence reduced.

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William Perkins.

WILLIAM PERKINS.

The combined effect of sect. 3 of 16 & 17 Vict. c. 119 (the Betting Act, 1853), and sect. 17 of 42 & 43 Vict. c. 49 (the Summary Jurisdiction Act, 1879), gives a Court of Quarter Sessions power to impose imprisonment in default of payment of a fine for an offence under the former section.

Severity of sentence.

This was an appeal against sentence pursuant to leave granted for an extension of time by the Lord Chief Justice, and an appeal from an order of Grantham J. refusing leave to appeal against conviction. [On June 19th counsel applied to a Divisional Court (the Lord Chief Justice, Darling and Bankes JJ.) for a writ of *habeas corpus* to the Governor of Chelmsford Gaol on the ground that there was no power to impose the sentence applicant was undergoing. The writ was refused as not being the proper remedy, but leave for this appeal was granted.] The appellant was convicted on May 25th, 1911, at the Chelmsford Quarter Sessions of using his house, 121, Morley Road, in the parish of Leyton in the county of Essex, for the purpose of betting with persons resorting thereto contrary to sect. 3 of the Betting Act, 1853 (16 & 17 Vict. c. 119), and was sentenced by the Chairman to a fine of £20 and £5 costs, or in default imprisonment for three months in Division II.

Frank Phillips, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The appellant was originally charged before a Court of summary jurisdiction, but availing himself of the provisions of sect. 17 of the Summary Jurisdiction Act, 1879, he elected to be tried by a jury on indictment. Upon his being found guilty by the jury, the Chairman purported to sentence him under sect. 3 of the Betting Act, 1853 (16 & 17 Vict. c. 119), but he had no jurisdiction to do so because that section by its terms limits the power of inflicting the penalties provided by it to a Court of summary jurisdiction on summary conviction, and this was not a Court of summary jurisdiction or a case of summary conviction. The Summary Jurisdiction Act, 1879, sect. 17, in giving a defendant, in certain cases, the right to be tried by a jury does not enact that Quarter Sessions shall have

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the power of inflicting the same penalties as might have been imposed by a Court of summary jurisdiction. In most cases this is unimportant because the statute creating or dealing with the offence provides the punishment without limiting the power of inflicting it to any particular Court. But sect. 3 of the Betting Act, 1853, does. In order to give Quarter Sessions the same power it must be expressly enacted as it is in the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), which by sect. 9 gives the option of trial by jury, and by sect. 4 enacts for a particular offence that the same punishment can be imposed by either tribunal. The absence of any similar provision from the Betting Act must be taken as excluding from Quarter Sessions the power to impose these penalties which can be imposed only by a Court of summary jurisdiction. No doubt the combined effect of sects. 1 and 3 of the Betting Act is to make the offence a statutory misdemeanour, and therefore the Court of Quarter Sessions would have, by common law, the power to punish by imprisonment or fine. In that case the fine would be recoverable under the Fines Act, 1822 (3 Geo. 4, c. 46), sect. 2, and if it is not paid, the sheriff can distrain, and if there is not a sufficient distress, the defendant can be imprisoned until the fine is paid. But under this procedure there would be an appreciable interval between the sentence imposing the fine and the taking into custody, which would have made a great difference to the appellant in this case, who has suffered a very great hardship by this course not being adopted. He was imprisoned at once, but if he could have returned to his home for a short time, as he stated, he could have realised his business, and out of the proceeds paid the fine. As it is, his immediate imprisonment and his consequent inability to look after his business has resulted in the whole value of it being entirely destroyed. Further, three months for a fine of £20 is unduly severe. By sect. 5 of the Summary Jurisdiction Act, 1879 the maximum period which may be imposed for non-payment of a fine of £20 is two months. Although a Court of summary jurisdiction may add the costs to the amount of the fine for the purpose of this section, the Court of Quarter Sessions cannot do so because costs in that Court are recoverable in a different way. The commitment in this case did not mention the £5 costs, it was for the £20 fine only. He also referred to sects. 2

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and 14, Prison Act, 1898 (61 & 62 Vict. c. 41); Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), sect. 6; *Brown*, (1895) 1 Q. B. 119; 18 Cox C. C. 81; 64 L. J. M. C. 1; C. C. R.; Russell on Crimes, 7th ed. p. 217. The appeal against Grantham's J. order refusing leave to appeal against conviction was not proceeded with.

C. E. Jones for the Crown. In fixing the amount of imprisonment in default of payment of a fine, the Court of summary jurisdiction can add the fine and costs together, and impose the term of imprisonment corresponding to the total sum. The proper alternative for non-payment of £25 is imprisonment for not more than three months, and Quarter Sessions had the same power for this purpose as a Court of summary jurisdiction. The combined effect of sect. 3 of the Betting Act, 1853, and sect. 17 of the Summary Jurisdiction Act, 1879, is to give Quarter Sessions the same power as the Court of summary jurisdiction for the purpose of inflicting the punishments provided by sect. 3 of the Betting Act, 1853. And even if this is not so the common law power of punishing a misdemeanour enables Quarter Sessions to impose a fine and to order the immediate imprisonment of the offender if the fine is not paid. If the Court can imprison until the fine is paid, it can imprison for the fixed term of three months for non-payment. If the appellant paid his fine now or at any time during the three months, he would be released, and therefore there is no substantial difference between the punishment actually inflicted and the punishment which it is admitted could have been inflicted at common law.

Avory J.: The substantial point taken here is that Quarter Sessions had no power to order imprisonment in default of payment of a fine. It is suggested that they could have imposed a fine or imposed imprisonment, but if a fine was imposed certain intervening steps have to be taken, *i.e.*, a distress must be made on the defendant's goods before he can be imprisoned in default of paying a fine. We do not agree with this contention. We hold that the Court of Quarter Sessions had power under sect. 3 of the Betting Act, 1853, to impose imprisonment in default of payment of a fine on the scale fixed by sect. 5 of the Summary Jurisdiction Act, 1879, and the scale of imprisonment is regulated by the sum of the fine and fixed costs. The Court of

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Quarter Sessions accordingly had full jurisdiction to order the appellant to be imprisoned for three months in the second division, but it is obvious from the proceedings in the Court below that representations were made by the prosecution to the effect that there was somebody behind the appellant who would pay the fine, and consequently a heavier fine was imposed than would otherwise have been imposed on the defendant, having regard to the offence and his means. That somebody has not come forward, and the appellant has been in prison for six weeks. Having regard to all the circumstances, the Court alters the sentence to a sentence of two months' imprisonment in the second division, to date from the day of conviction.

Sentence reduced.

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

ISAAC SCHRAGER.

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Isaac Schrager.

The Court's disapproval of a verdict of guilty is not necessarily a ground for quashing a conviction.

Appeal against conviction on certificate.

Appellant was convicted before the Chairman at Hertford Quarter Sessions on 12th June, 1911, of inflicting grievous bodily harm, and sentenced to three months' imprisonment in the second division.

A. W. Elkin for the appellant, who was on bail. Appellant was charged with having violently struck the prosecutor on the jaw at a race-meeting, when the prosecutor was demanding payment of a bet, which he had won from a bookmaker. The prosecutor and a witness both stated that the aggressor was wearing light clothes. The appellant was arrested about half an hour afterwards, when seated in a taxicab on the course, and was at the time wearing dark clothes. It was suggested that he had changed his clothes, but search in the cab and elsewhere failed to discover any suit. Witnesses were called for the appellant to prove that he had been sitting in the cab for two hours; and appellant bore a good character. There was no sufficient evidence of identity, and the verdict of the jury was against the weight of evidence.

Eustace Fulton for the Crown. The appellant gave evidence that he had never been at a race-meeting before, but when his witnesses were cross-examined, this statement was proved to be

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Schrager.

false. The jury had chosen to believe prosecutor's story as a whole, rather than appellant's, and were entitled to do so.

The Lord Chief Justice: This case comes before us in very peculiar circumstances. When there has been a proper direction to the jury it is not the usual practice of this Court to interfere with the jury's verdict and to re-try the case. It is only in very exceptional cases that this rule will be departed from. But here we have a report from the Chairman of the Bench that not only he but all the magistrates on the Bench thought that the evidence against the appellant was not sufficient to justify the conviction. There was no motive suggested for the assault by the appellant, and no evidence that the appellant was connected with the book-maker to whom the demand for payment was being made when the blow was struck. Both the prosecutor and the witness for the prosecution stated to the constable that the assailant was wearing a light cap and a light suit, and the appellant when arrested was wearing dark clothes. The person charged with the offence had remained close to the scene of the outrage for half-an-hour, and had made no attempt to get away. There was some evidence, too, that he had been in the cab at the time the assault took place. On the evidence of the prosecution, the case against him was very doubtful, and in all the circumstances it did seem to the Court that there was a reasonable and substantial amount of doubt as to the guilt of the appellant. The conviction, therefore, could not stand; but it must not be supposed that the fact that a judge disapproved of the verdict of the jury would alone be sufficient to upset a conviction.

Conviction quashed.

N. B.

Solicitor for the Appellant—*J. de Meza.*

LEONARD DOLLERY.

1911
17 *July.*
Leonard Dollery.

Conviction quashed where the Court had reason to believe that the verdict was perverse.

This was an appeal against conviction upon a certificate granted by Channell J., before whom appellant was convicted of larceny at the Winchester Assizes on June 26th, 1911. Sentence was deferred, and appellant was released on bail.

E. H. S. Bligh for the appellant (under s. 10 of the Criminal Appeal Act). Appellant was charged with stealing a bicycle, the property of a friend. He had been returning to his home, and missing the last train, he went to his friend's cottage, which was some fifty yards from the high-road, and, as was admitted, he took the bicycle and rode off on it. The bicycle was found by a workman the next morning lying in a ditch about 200 yards away from the house where appellant lodged. A match-box belonging to appellant was found close by. The bicycle was taken by the finder to the police, and the appellant was charged with having stolen it in the evening. He stated that he had only borrowed the bicycle, and that he had left it in the ditch because he could not bring it into the house, and had meant to return it the next day. When he went the next morning to the place where he had left it, he found that it had disappeared. At the close of the case for the prosecution counsel had submitted to the judge that there was no case to go to the jury. The judge said that probably there was no intention to steal, and that if he were a juryman he would so find; but that the case ought to be left to the jury. Counsel accordingly did not put appellant into the box, and the judge directed the jury in favour of appellant. The jury, however, brought in a verdict of guilty. The judge would not accept the verdict, and remarked that he had thought the jury had some common sense. Had he thought they would act in the way they had, he would not have left the case to them. He then directed the case for the defence to be proceeded with before the same jury, and added a few more words of summing up, directing the jury again that no *animus furandi* had been

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17 *July.*
Leonard Dollery.

proved against the appellant. The jury again brought in a verdict of guilty, and this verdict was adopted, but the judge postponed sentence, and granted a certificate for appeal.

S. H. Emanuel, for the Crown. There was some evidence to justify the jury's verdict; the appellant had told falsehoods to the police when charged. The Court should not interfere with a verdict of a jury.

PICKFORD J.: The trial was very unsatisfactory, as it had been conducted in two pieces, and the judge's remarks to the jury after they had brought in their first verdict were not calculated to make them re-consider their opinion fairly. If the whole case had been before the jury at once, the Court could not very easily have interfered with the conviction. But as it was, the case and evidence for the defence had not been placed before the jury when they brought in their first verdict, and they were not in a mood to treat the matter fairly afterwards. The judge was of opinion that the verdict was against the weight of evidence, and in view of the unsatisfactory character of the proceedings, it could not be supported, and the conviction could not stand.

Conviction quashed.

N. B.

17, 18 *July.*
Hackford Machardy.

HACKFORD MACHARDY.

This case is reported under the date of July 29th.

JOHN SYME.

1911
17 *July.*
John Syme

A letter sent in order, by reason of a threat of murder contained in it, to make someone do what otherwise he would not do is sent "maliciously" within the meaning of s. 16 *of* 24 *&* 25 *Vict. c.* 100, *the Offences against the Person Act*, 1861. *It is not essential to prove any real intent to carry out the threat.*

This was an appeal against conviction on a certificate granted by Darling J.

The appellant was indicted at the Central Criminal Court under 24 & 25 Vict. c. 100, s. 16, for maliciously sending a letter threatening to murder. He was found guilty on July 4th, and sentenced to six months' imprisonment.

Charles Bray for the appellant, who was on bail.

The appellant was indicted for sending a letter to Mr. Ramsay Macdonald, M.P., the head of the Labour party, threatening to kill one Alfred Reed, an inspector of police. The section of the Act constitutes the felony where a person maliciously sends, knowing the contents thereof, any letter threatening to kill or murder any person. There must be malice, knowledge of the contents and a threat to kill, and these three elements were not found by the jury in their verdict. Darling J. left to the jury three questions: "(1) Is the defendant guilty or not guilty of maliciously sending letters, threatening to murder Alfred Reed? (2) Did he intend to murder Reed, or was the threat bluff, and made in order to call attention to his grievances? (3) Did the defendant send the letter of June 15th with the intention of so alarming Mr. Ramsay Macdonald as to the safety of Reed's life that Mr. Macdonald and his friends would support the defendant's claims against the Home Secretary and the police authorities?" The jury did not return specific answers to these questions, but brought in a special verdict: "We are of opinion that the defendant wrote the letter of June 15th with the object of pressing Mr. Ramsay Macdonald and his friends to support his claims against the Home Secretary and the police authorities. We are further of opinion that he did not intend to murder Reed, and that the threat was bluff, and made to call attention to his grievances." On this finding the judge was wrong in holding

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John Syme.

that there was a verdict of guilty. The jury had not found malice, and that was a necessary element to constitute the crime. The jury, moreover, had not found that the letter contained a threat, and in fact there was no threat. Darling J. had contrasted a real threat and bluff; and by bluff must be understood no threat. The sentence in the letter which was alleged to contain the threat to kill was:—"I am firmly resolved to overthrow this cursed officialdom which is slowly mining our country; and I repeat . . . that if the members of Parliament are not willing to do their duty, and if I am unable by any other legal means to obtain justice, I am quite prepared to kill Mr. Reed with my own hands and leave the judgment with my countrymen." It should have been left to the jury whether this amounted to a threat or not; *Tyler*, Moody C. C. 428 (1835).

The *Attorney-General* (with him *Bodkin*, *Rowlatt* and *Graham-Campbell*) for the Crown. The jury's finding is sufficient to justify the conviction. Syme meant to make Mr. Ramsay Macdonald believe that he intended to murder Reed; and it was immaterial whether he actually intended to kill. It was a threat within the statute if he conveyed the impression that he meant to kill. Darling J.'s second question was only directed to sentence, and not to the question of whether the offence had been committed. "Maliciously" in the statute meant with an improper motive; and here the appellant sent the letter with an improper motive. It was malicious if he wrote a letter which amounted to or contained a threat to murder in order to induce Mr. Macdonald to take a course of conduct which otherwise he would not have taken.

Bray, in reply: The appellant did not intend to threaten, and did not intend to murder. That was his defence from the outset, and was before the jury. The letter was only rhetoric, and the jury meant that when they said it was bluff.

C. a. v.

24 *July.*

The Lord Chief Justice: In the course of his summing up the learned Judge indicated the questions which he proposed to put to the jury, three of which he reduced into writing. They were as follows:—(1) Is defendant guilty or not guilty of

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24 *July.*
John Syme.

maliciously sending the letter threatening to murder Alfred Reed? (2) Did he intend to murder Reed, or was the threat "bluff" and made in order to call attention to his grievances? (3) Did the defendant send the letter of June 15th with the intention of so alarming Mr. Ramsay Macdonald as to the safety of Reed's life that Mr. Macdonald and his friends would support defendant's claims against the Home Secretary and the police authorities?

The jury did not reply directly to the questions, but returned a verdict in the following terms:—"We are of opinion that defendant wrote the letter of June 15th with the object of pressing Mr. Ramsay Macdonald and his friends to support his claims against the Home Secretary and the police authorities. We are further of opinion that he did not intend to murder Reed, and that the threat was 'bluff,' and made in order to call attention to his grievances." The learned Judge considered this finding equivalent to a verdict of guilty, and sentenced the appellant thereon to six months' imprisonment.

It was contended before us by Mr. Bray, on behalf of the appellant, that this verdict did not amount to a verdict of guilty, upon the ground, first, that the jury did not find that the letter sent by the defendant threatened to kill and murder Reed; and, further, that the object of writing the letter as found by the jury amounted to a finding that the appellant had not acted maliciously. It is well established that the Court cannot add to the findings of a special verdict, but that the Court must be satisfied that the jury have found facts which amount to proof of the crime charged in the indictment. From this point of view the first question cannot be regarded as free from difficulty, but upon the whole we are of opinion that the jury have found that the letter did contain a threat to murder, that they were of opinion that the appellant did not intend to murder Reed, and that the threat was "bluff" and made in order to call attention to his grievances.

In the opinion of the Court the words "the threat" refer to the preceding words "intend to murder," and the verdict does amount to a finding that the letter contained that threat. It was urged before us that the letter was capable of being construed otherwise than as containing a threat to kill and murder, that it only stated that the writer was quite prepared to kill Reed in a

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24 *July.*
John Syme.

certain state of things, but in our judgment the language of the finding of the jury does not admit of this view.

We have now to consider the other point, as to whether or not the finding of the jury negatived malice. As to the meaning of the word "malicious," the learned Judge directed the jury in the following terms:—"There are many things which a man may do which are malicious if they are done from an improper and indirect motive. I should say that to try and induce a person to do that which he otherwise would not do unless you threatened to murder some one else would be done with an indirect motive. It might be an utterly improper motive. In fact, I can hardly conceive circumstances in which it would be proper to try to get an advantage for one's self by threatening to murder somebody else.

"The word 'malicious' to my mind (and you may take this as a direction) implies the doing of that which a person has no legal right to do and his doing it in order to secure some object by means which are improper. If you come to the conclusion that these letters were written in order to make people do, for fear that he would commit a murder, that which they otherwise would not do—if you come to that conclusion I shall tell you that then he did it maliciously within the meaning of the word as it is used in the statute."

This direction seems to the Court to be correct, and, in our opinion, the finding of the jury already quoted amounts to a finding that the appellant had acted maliciously within the meaning of the direction given by Mr. Justice Darling. For these reasons we are of opinion that the appeal should be dismissed and the conviction affirmed. The sentence will run from the date of the conviction.

Solicitors for the Appellant—*Crawshay & Caldicott.*

N. B.

WALTER DARGUE.

1911
24 *July.*
Walter Dargue.

Verdict substituted and sentence varied accordingly under s. 5 (2) of the Criminal Appeal Act.

Appellant was convicted, on June 20th, 1911, at Sheffield City Sessions on an indictment containing six counts, four for obtaining, and attempting to obtain, goods by false pretences, and two laid under s. 13 of the Debtors Act, 1869, and was sentenced to four months' imprisonment with hard labour. The appeal was by leave of the full Court.

Cuthbertson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The grounds of the appeal are—

(1) That there was no evidence that the pretences alleged were false.

(2) That the documents will not bear the interpretation put upon them.

(3) That there was no evidence that the pretences alleged induced the prosecutor to part with his goods.

(4) That in the summing up a new case was started, which was never pleaded or alleged by the prosecution.

Substantially the only counts which went to the jury were for obtaining and attempting to obtain a quantity of drills and files from a firm named Jessops, Ltd. Appellant used printed paper describing himself as "Consulting Mechanical Engineer, &c.," and containing a list of patents of which he was the owner. On this paper he ordered on one occasion seventeen drills, and on others several gross of files, some of which he either pawned or sold below cost price without paying for them. The false pretences alleged were (1) that he was carrying on business as a consulting mechanical engineer; (2) that he was the owner of patents; (3) that he genuinely required these articles for his said business. The evidence clearly established the truth instead of the falsity of the first two representations. The third cannot be got out of the documents: no one would suppose that a consulting mechanical engineer would require so many files for that business. In his summing up the learned Recorder indeed suggested that the word "&c." might imply a representation that

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24 *July.*
Walter Dargue.

he was also carrying on the business of a dealer in files, but this was never suggested by the prosecution nor laid in the indictment. The only witness called from Jessops, Ltd., was a cashier who had never seen the order forms at the time, who had nothing to do with the decision as to giving credit, and could not say whether the firm relied upon the representations in the orders in giving credit. It is an essential element in the offence to prove that the prosecutor, in parting with the goods, relied upon the representations: *King*, (1897) 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329; C. C. R.

H. R. Bramley, for the Crown, cited *William Jones*, (1898) 1 Q. B. 119; 19 Cox C. C. 87; 67 L. J. Q. B. 41; 77 L. T. 503; C. C. R.; and *Thompson*, 5 Cr. App. R. 9 (1910).

Even if there was no evidence that the prosecutor parted with the goods on the faith of the representations, the Court can reduce the conviction to one for an attempt under s. 5 (2) of the Criminal Appeal Act. The jury must have thought, and rightly, that the orders meant that the goods were required for appellant's business, which was clearly not the fact, having regard to the appellant's subsequent dealings with them and to his own admissions in evidence.

Avory J.: The prosecution failed to establish one element in the full offence, namely, that the persons to whom these orders were sent had been induced by the false pretences to part with their goods. The cashier was not the proper person to prove that, because he had nothing to do with accepting the orders. The works manager could have done it, but he was not called. The Court is, however, of opinion that the jury must have been satisfied of facts which justified a conviction for the attempt, and under s. 5 (2) of the Criminal Appeal Act, will substitute that verdict. But this conviction cannot carry hard labour. The sentence will be four months' imprisonment without hard labour, to run from date of conviction.

Verdict substituted; sentence varied.

A. S. C.

ISAIAH BROOKS.

1911
24 *July.*
Isaiah Brooks.

Conviction quashed in view of misdirection on facts and misreception of evidence.

Appeal against conviction by leave of Avory J.

Appellant was convicted at Warwick County Sessions on June 28th, 1911, for stealing £70 from a tin box belonging to his brother-in-law, and sentenced to five months' imprisonment with hard labour.

R. A. Willes for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence was entirely circumstantial, and not very strong. Prosecutor kept his Post Office Savings Bank book and £70 in gold with a hat and some clothes in a locked box in his bedroom. He last saw the money safe there on May 8th; on the 11th, at 9 p.m., he missed it; the box was unlocked; he had the only key, as usual, in his pocket at the time. Appellant had been in the habit of calling on his sister when her husband, the prosecutor, was out, and was there on May 11th, from 4 p.m. to 7 p.m., being part of the time alone in the house; a part of the time the house was empty, as they both went out. The prosecutor's wife, who was herself suspected of the theft, gave evidence of a conversation she had with appellant the day after the loss was discovered, in which appellant was alleged to have said: "Your husband has more money than you are aware of; his bank-book shews that he has £200 at the bank." As the bank-book was kept in the tin box from which the money was stolen, this was a strong piece of evidence. But before the magistrates she had said that *she* had mentioned the £200 in the bank to him, and nothing about the bank-book at all. This contradiction was pointed out in cross-examination, but in his summing up the learned Deputy-Chairman told the jury that it did not make much difference, as either version shewed that the appellant opened the conversation. He also told the jury that appellant had for the first time at the trial mentioned two men whom he saw leaving the house about the supposed time of the theft, but he omitted to tell them that appellant had sworn when before the magistrates to seeing and talking with one (a third man). Further, the prosecuting counsel was allowed, in

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24 *July.*
Isaiah Brooks.

spite of objection, to read in cross-examination of appellant a letter written two days after the theft by the prosecutor's wife to appellant's daughter, containing accusations against him, and threatening to expose him "if he did not own up."

Appellant admitted that he saw the letter, and it was put against him that because he did not go and attack his accusers that was evidence that he stole the money.

A. J. Laurie for the Crown. Appellant admitted having seen the letter, and the suggestion was that by taking no steps to meet the accusation, he admitted its truth. Even allowing that it is inadmissible, it cannot have influenced the result, as the statements in it were merely those which prosecutor and his wife had already made in evidence. Allowing also that the Chairman's remarks about the contradiction in the wife's evidence were not sufficiently favourable to appellant, they were merely an expression of his opinion, not a misdirection in law.

PICKFORD J.: The appellant was convicted of stealing £70 from his brother-in-law. The evidence was circumstantial. He was alone downstairs in the house, where the money was in a box upstairs, on the supposed day of the robbery. It was not proved that he knew it was there, and though it was shewn that he afterwards paid some arrears of rent, amounting to £2 or £3, it was not shewn that he was in possession of any large sum. There was a good deal of suspicion, but not much evidence. It was, therefore, of very great importance that there should be a careful direction. In these circumstances the remark of the Deputy-Chairman to the jury as to the effect of the contradiction in the evidence of prosecutor's wife constitutes a rather serious mistake in direction, although it was not a misdirection on law. It is certainly not the way in which the matter ought to have been put before the jury. With regard to the letter, the fact that appellant had seen it does not make the contents admissible, nor is it easy to see what steps he ought to have taken about it. His conduct certainly did not amount to an admission of its allegations. The jury should at least have been warned to pay no attention to it. Appellant certainly mentioned seeing one man near the house when before the magistrates, and at the trial he mentioned the same man with one or perhaps two others. The

1911
24 *July.*
Isaiah Brooks.

Deputy-Chairman told the jury he had never spoken of these men before, a remark which was calculated to create the impression that his defence was raised at the last moment. If the evidence had been strong, we think these matters might not have led to any miscarriage of justice, but in this case we think they are of importance, and that the trial was not satisfactory.

Conviction quashed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE AND MR. JUSTICE PICKFORD.

1911
28 *July*.
William Griffiths.

WILLIAM GRIFFITHS.

Severity of sentence.

Appellant pleaded guilty at Guildford Borough Sessions, on July 3rd, for obtaining money by false pretences, and was sentenced to three years' penal servitude.

Appellant in person handed in a statement.

Blanco White, for the Crown, did not press the sentence.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty to obtaining sums of 3*s*. and 1*s*. by false pretences. Ten other cases were mentioned, but it is not clear that he asked for them to be dealt with, and they may only have been bad cases of begging. There were twelve previous convictions, but the last was in 1908, also for false pretences, when the sentence was six weeks' imprisonment with hard labour. Since then he appears to have been working, though we cannot accept his statement that he always tried to earn an honest living. This sentence is too severe, and it will be reduced to one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. S. C.

WILLIAM GEORGE EVERITT.

1911
28 *July.*
William George Everitt.

On the charge of being "a habitual criminal" within s. 10 (2*a*) *of the Prevention of Crime Act*, 1908, *the three previous convictions which the jury must find within that sub-section may be sufficient evidence for the jury when the offences committed shew deliberate and systematic preparation, and are repeated at an early opportunity after release from prison.*

Appellant was convicted on July 6th, 1911, at Liverpool Assizes of obtaining money by false pretences, and sentenced by Lush J. to three years' penal servitude: he was also convicted of being a habitual criminal, and sentenced to five years' preventive detention. He now appealed against sentence and applied for leave to appeal against both convictions, and for legal aid. The latter application was not granted.

Appellant having been heard, the Court considered the conviction as a habitual criminal, in view of the fact that in this charge only the three statutory convictions had been proved against him.

Lindon Riley, for the Crown: In the case of each of the previous convictions there were other indictments besides that on which appellant was actually convicted, and the appellant had asked that the offences charged in them might be taken into account in his sentences. No doubt there were considerable intervals between his coming out of prison on each of these occasions and the next occasion, but the view taken by Lush J., and by the jury was that for an offence of this kind, which, in each case, was that of obtaining money by the false pretence of being in business as an auctioneer and having valuable properties to dispose of or requiring clerks or pupils, the machinery necessary took some time to prepare. Moreover, some of the offences charged were of earlier dates than those in the three convictions proved: they were spread over the intervening periods. There was therefore evidence that appellant had always intended to carry on this bogus business and began to prepare for it as soon as he got out of prison. He was a very plausible person, and his victims were often women and other people not versed in business: he was therefore not a mere nuisance, but a danger.

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28 *July*.
William George Everitt.

PICKFORD J.: In this case there were seventeen charges of false pretences ultimately reduced to five, on which the jury convicted. There was ample evidence to justify them in doing so. With regard to the conviction as a habitual criminal it was true, as the appellant objected at the trial, that there were only the three previous convictions required by the statute. But the objection was overruled, and the point had been decided in *Waller*, (1910) 1 K. B. 364; 79 L. J. K. B. 184; 74 J. P. 81; 26 T. L. R. 142; 3 Cr. App. R. 213. Much depends on the nature of the offences: where an offence requires no preparation or deliberation, and there was no evidence of a system, probably the three convictions would not, without other evidence, be sufficient. But when they require deliberate and systematic planning, and are repeated at the earliest opportunity after release, they may be sufficient material for a jury to consider, as evidence of an intention to live by crime alone. At first the learned judge did doubt if it was sufficient, and the appellant had urged this very strongly, but it was plain from his summing up that that doubt was removed. Appellant was convicted of conspiracy to defraud in 1898, and sentenced to eighteen months' imprisonment with hard labour; in 1901 he was convicted of obtaining money by false pretences of a similar kind, and sentenced to four years' penal servitude. In 1905 he was convicted in another name for similar false pretences, and sentenced to four years' penal servitude and three years' police supervision. At the time of his latest offence he was bound to report himself to the police, and failed to do so, and had a *remanet* sentence of a year and a half to serve. There was evidence that he was living an extravagant life, not such as a man honestly trying by hard work to redeem his character would live. This evidence was rightly left to the jury, and they were satisfied that appellant was a habitual criminal. It is therefore impossible to interfere. It must always be remembered that five years' preventive detention does not necessarily mean that appellant would be in confinement the whole of that time. The authorities had ample power to release him at an earlier date if satisfied that it was safe to do so.

Appeal dismissed.

A. S. C.

PETER QUINN.

1911
28 *July*.

Peter Quinn.

If a jury has been sufficiently warned by counsel of the necessity for corroboration of certain evidence, a conviction will not be quashed merely because the warning was not repeated in the summing up.

Appellant was convicted at Liverpool Assizes on July 5th, 1911, before Mr. Commissioner Ashton, K.C., of having unlawful carnal knowledge of a girl under sixteen, and was sentenced to twelve months' imprisonment with hard labour; he appealed against conviction, by leave of Avory J., and applied for leave to call further evidence.

B. Brandreth, for appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant lodged with some people named Mason, whose adopted daughter the girl was. Her story was that the offence took place in the kitchen on three Sunday afternoons. As to that the defence was that the Mason family always played cards in the kitchen on Sunday afternoons. Appellant further suggested that Mason himself was the cause of the girl's trouble. He also made a suggestion against another lodger, which was withdrawn. These suggestions were put at the police court by the solicitor who defended appellant there (but not at the trial), and then for some reason at his request no reference to them was entered on the depositions. The Commissioner was therefore wrong in saying that these charges were made for the first time at the trial. Mason and his wife gave evidence, but they did not corroborate the girl's story at all: they merely contradicted the defence. The Commissioner told the jury that they did corroborate the girl, and gave them no caution whatever. The jury ought to have been cautioned that, in a case of this nature, where there was no corroboration, they must exercise extreme caution before convicting. That being so the conviction cannot stand. *Brown*, 6 Cr. App. R. 24 (1910). The doctor contradicted the girl's statement that she had only had connection with men three times, but the Commissioner told the jury they could ignore that.

A witness was called by leave of the Court, who confirmed appellant's story of the card-playing, but not on the material dates.

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28 *July.*
Peter Quinn.

Singleton, for the Crown. I cautioned the jury in opening as to the importance of corroboration, and I replied merely for the purpose of reading and I did read to them the passage of the summing up of Pickford J. in *Graham*, 74 J. P. 246; 4 Cr. App. R. 218 (1910); which was approved in this Court. The point was, therefore, clearly before the jury, even if it was not sufficiently dealt with in the learned Commissioner's summing up. Appellant's defence was an attack upon Mason; the substantial question for the jury, therefore, was whether appellant or Mason was the man. So that Mason's denial, supported by his wife, was in a sense some corroboration of the girl's story.

Brandreth in reply.

The Lord Chief Justice: In this case we have come to the conclusion that we cannot interfere. No doubt the summing up by itself did not constitute a sufficient direction, and this would be especially important if the character of the girl were such that no one could rely upon her statements. But we are now informed that both at the beginning and at the conclusion of his case counsel for the Crown called attention to the importance of corroboration, and read to the jury the direction we approved in *Graham's* case. It is clear, therefore, that the learned Commissioner did not think it necessary to repeat it. The case took a very curious course, and it is more than probable that the jury did not believe the evidence of appellant. At the police court his solicitor made charges against both Mason and Regan, which did not appear upon the depositions, at his request, though how the clerk came to allow such a proceeding we cannot understand. At the trial appellant began by reiterating the charge against Regan, but afterwards withdrew it. The issue, therefore, upon which the trial to a great extent turned was whether Mason or the appellant was the guilty man. In that way we can well understand the learned Commissioner saying that Mason's evidence, with that of his wife, was some corroboration of the girl's story.

Appeal dismissed.

A. S. C.

CLARISSA HEARTSCH.

1911
28 *July.*
Clarissa Heartsch.

Conviction quashed in view of fresh evidence.

Appellant was convicted on June 28th at the County of London Sessions before the Deputy-Chairman, for obtaining money by false pretences, and was bound over in her own recognisances. She now appealed against conviction on certificate.

I. A. Symmons, for appellant (under s. 10 of the Criminal Appeal Act), who was present. On June 12th, appellant went into a butcher's shop with a letter purporting to be signed by Hamilton J., asking the proprietor to cash a cheque enclosed for £15. Both letter and cheque were forgeries. The cheque was cashed, but an assistant, being suspicious, followed appellant into another shop, where she presented a similar letter. She was then arrested. Her defence was that a man spoke to her in Hyde Park, and invited her to earn a small sum by collecting debts for him from these tradesmen. She was not defended by counsel, and only told this story from the dock. It was not unnaturally discredited, and she was convicted. Next day she was brought up for sentence, when a detective deposed that he had arrested the man mentioned by appellant, who admitted that she and other women had been duped by him as she described. The police were satisfied that this was true, and the learned Deputy-Chairman released her on bail, and gave her a certificate for appeal to this Court.

Poley, for the Crown, did not support the conviction.

The Lord Chief Justice: It is not surprising that the jury did not believe the appellant's story at the trial, as it is most improbable, and is the sort of story constantly told by prisoners in this kind of case. However, further enquiries, following upon the man's arrest, shewed that it was true. As there was, therefore, no evidence of any criminal intent on appellant's part, the conviction must be quashed.

Conviction quashed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, MR. JUSTICE PHILLIMORE, MR. JUSTICE PICKFORD AND MR. JUSTICE HAMILTON.

1911
29 *July.*

Hackford Machardy.

HACKFORD MACHARDY.

There is no appeal against that part of a special verdict under s. 2 of 46 & 47 Vict. c. 38, The Trial of Lunatics Act, 1883, which finds the defendant to be insane.

Appellant was tried on June 24th before Lush J. at Lancaster Assizes on a charge of arson, when the jury returned a verdict of guilty but insane. He was sentenced to be detained during his Majesty's pleasure. He appealed against conviction, by leave of Avory J. The appeal was argued on July 17 and 18 before the Lord Chief Justice, Pickford and Avory JJ., when *McKeever*, for appellant, informed the Court that the learned judge had admitted evidence, despite his (counsel's) objection, that about three years previously appellant had been confined in a lunatic asylum; in summing up, the judge told the jury that there was no evidence of insanity at the time the offence was committed, and that insanity had not been pleaded as a defence. On the appeal, appellant gave evidence and denied the charge. The Court having taken time to consider its judgment, ordered the case to be re-argued before a full Court. To-day the Court stated that in its opinion the proper verdict would have been one of "guilty," and that there was no evidence of insanity, the special verdict having been found by the jury contrary to the desire of the defence, and the direction of Lush J.

Bodkin (with him *McKeever*, under s. 10 of the Criminal Appeal Act), for appellant, who was present. The conviction was under s. 2 of 24 & 25 Vict. c. 97, the Malicious Damage Act,

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1861: s. 58 of that Act makes it quite clear that malice is required to establish the offence of arson. *Ireland,* (1910) 1 K. B. 654; 79 L. J. K. B. 338; 26 T. L. R. 267; 74 J. P. 206; 4 Cr. App. R. 74, decides, unless it is reversed, that there is an appeal against this special verdict; if that is correct, appellant ought to be acquitted, because a verdict of insanity negatives malice. If that is so, in view of the fact that he is not in fact insane, there is no justification for detaining him. The Home Secretary cannot remit him to prison if this Court quashes this verdict. See 47 & 48 Vict. c. 64, Criminal Lunatics Act, 1884, s. 3.

[The Lord Chief Justice: We have heard from the Home Secretary that he does not consider he has the power to send a criminal lunatic to an ordinary prison.]

This Court can look at the evidence, and if, as the fact here is, there is none justifying the verdict of insanity, the special verdict, which is one and indivisible and was given without any evidence to justify it, must with its consequences fall to the ground, and appellant must be released.

Previous to 39 & 40 Geo. 3, c. 94, the verdict in the case of an insane person was simply "not guilty." That Act gave the jury power to find insanity, and gave the Court power to detain such a person during the pleasure of the Crown. The Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, altered the law which had existed from 1800, and gave to the jury the power to find a prisoner "guilty," though not of the "offence," but of the "act or omission" charged. This Act repealed s. 1 of 39 & 40 Geo. 3, c. 94, but left s. 2, which is still the section under which prisoners are found "unfit to plead." It has been held, in *Larkins,* 6 Cr. App. R. 194 (1911), that no appeal will lie against that finding, but in such a case there has been no trial. But here the finding of "guilty" is enough to bring the case within s. 3 of the Criminal Appeal Act. An appeal therefore lies, but it does not follow that appellant has been found "guilty" of any "crime or offence," for, in certain classes of offences, a certain state of mind is necessary, and "guilty but insane" does not carry that state of mind, and it negatives the "*mens rea*" which is an essential element in arson: *Tolson,* 23 Q. B. D. 168 (1889); 58 L. J. M. C. 97; 60 L. T. 899; 54 J. P. 4;

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16 Cox C. C. 619; C. C. R. The malice in this case must be against the property burned. *Pembliton*, L. R. 2 C. C. R. 119; 30 L. T. 405; 12 Cox C. C. 607; 43 L. J. M. C. 91 (1874). It is true that the jury probably negatived accident and justification, but they have not found malice. If the appellant was not sane, he must be presumed to be *doli incapax*, until the contrary is proved, like a child between seven and fourteen: per Littledale J., *Owen*, 4 C. & P. 236 (1830). This Court has no power to substitute a verdict of guilty and pass sentence; s. 4 (1) of the Criminal Appeal Act does not empower it to deal with part of a verdict, and this case does not fall within any of the provisions of s. 5. There has been here a miscarriage of justice in that appellant has been found insane without evidence, and the conviction should be quashed.

A. J. Laurie, for the Crown: There is no right of appeal in this case, and if there is it applies only to the verdict of "guilty," not to that of "insane." Although the word "offence" is mentioned in s. 1 of the Act of 1883, the section directs that a prisoner is to be found guilty not of "an offence," but of the "act charged." The distinction is clearly intended, and shews that this verdict does not amount to a conviction, because the word "conviction" can only be used as meaning conviction of an offence or crime. The intention of the Act of 1883 was not to alter, but merely to clarify the previous law. Insanity negatives the criminality of the act. This Court can only deal with appeals against conviction and sentence: this is not a conviction, and if it is a sentence, it is one "fixed by law." In either case this Court cannot interfere with it. If this is a conviction a man three times so convicted, although each time not responsible for his actions, could be afterwards tried as a habitual criminal. The decision in *Ireland* was therefore wrong. But even if it was right, the appeal lies only against so much of the verdict as finds appellant guilty. For if a murderer could be defended at the trial on the ground of insanity, he might get a verdict in his favour on insufficient evidence, and then come to this Court and get it set aside, with the result that he would go free. For the Criminal Appeal Act only gives the Court power to substitute a verdict of "guilty but insane" for one of "guilty" (s. 5 (4)): there is no converse power.

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[The LORD CHIEF JUSTICE: Why should we not substitute "the right conclusion" under s. 5 (3)?]

Because that sub-section only deals with a wrong judgment: here it is the verdict which is wrong. The Court has no power to touch this verdict at all, even if the decision in *R.* v. *Ireland* is correct, because this Court has stated that the verdict of guilty was, in its opinion, right, and the addition that the prisoner was insane at the time is the only finding which was wrong. The Court cannot quash a conviction which was right, because of an addition in favour of the prisoner which was wrong.

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The LORD CHIEF JUSTICE: In the opinion of the majority of the Court this appeal should be dismissed. The appellant was indicted on a charge of arson under s. 2 of 24 & 25 Vict. c. 97. The jury found a verdict in accordance with the Trial of Lunatics Act, 1883, that the appellant was guilty but insane at the time so as not to be responsible according to law. In the case of *R.* v. *Ireland*, this Court decided that an appeal can be brought under the Criminal Appeal Act against such a verdict. Argument was addressed on behalf of the Crown as to whether this decision was correct. In the opinion of the Court it was, the appellant having been convicted on indictment within the meaning of s. 3 of the Criminal Act, and the finding of the jury that he was guilty of the act charged against him is a conviction. The prisoner is detained under an order following that verdict, and if the view taken in *R.* v. *Ireland* is not correct, although the finding of the jury as to the guilt of the prisoner might have been the result of the admission of improper evidence or of gross misdirection there would be no appeal.

The Court has now to consider whether, assuming *R.* v. *Ireland* to be correctly decided, an appeal lies against the finding of the jury that the appellant was insane, and whether in fact that part of the finding is a part of the conviction against which an appeal lies. In the opinion of the Court it is not. It is a finding of the jury in aid of the prisoner and in his relief. Under the statute they found him guilty of the act or omission charged against him, but that he was insane when he did the act or made the omis-

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sion. It is doubtful whether it can be successfully contended that the finding negatives any essential ingredient of the offence, but even assuming that it does, it is not, in the opinion of the Court, a part of the conviction, but a special verdict of the jury in relief of the prisoner. In the opinion of the Court, this view is supported by sub-s. (4) of s. 5 of the Criminal Appeal Act, which allows the Court even in the case of a man convicted and sentenced in the ordinary way to find that he was insane and make an order under the Act of 1883. The detention of the prisoner under the Act of 1883 is not a part of the conviction, but is the result of a statutory provision as to how a person found insane by such a special verdict shall be dealt with. For these reasons the Court is of opinion that there is no appeal against the part of a special verdict under the Act of 1883 which finds the prisoner to be insane.

Appeal dismissed.

The Court stated that it would communicate with the Home Secretary with regard to this case.

A. S. C.

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Henry Banks.

CHARLES HENRY BANKS.

After a plea of not guilty, a plea of autrefois acquit *is bad.*

Appellant was convicted on July 5th, 1911, at the Central Criminal Court, before Darling J., on an indictment charging him with manslaughter, and sentenced to eighteen months' imprisonment with hard labour. He was also committed to the same Court on a coroner's inquisition, together with a woman named Douglas, charged with the murder of the same person. The woman was not charged on the indictment for manslaughter. They were arraigned, and both pleaded "not guilty" to the inquisition; appellant also pleading "not guilty" to the indictment. No evidence was offered by the Crown on the inquisition, and the prisoners were acquitted by the jury under the direction of the judge, who stated that there was an indictment against appellant for manslaughter. When brought up for trial on the

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indictment, he applied for leave to file an additional plea of *autrefois acquit*, which was accepted by Darling J. The above facts were proved by the Clerk of the Court, but Darling J. directed that they formed no evidence in support of the plea, and the jury found against appellant on this plea. Against this verdict and the conviction the present appeal was brought. It was partly argued on July 24th before the Lord Chief Justice, Pickford and Avory JJ., who ordered that it should be re-argued before a full Court.

A. S. Carr, for appellant (under s. 10 of the Criminal Appeal Act), who was present. If appellant had been charged alone on indictment with manslaughter on the first occasion, and after evidence had been called he had been acquitted by the jury, or the evidence had broken down, clearly he could not have been tried again. It makes no difference that the first proceeding was on a coroner's inquisition (1 Chitty, Criminal Law, 163); nor that the first charge was murder, for on that charge he could have been convicted of manslaughter (2 Hale P. C. 246); nor that on the first occasion another person was charged with him. *Dann*, 1 Moody C. C. 424 (1835). The only possible answer to this plea is that in fact he was not in peril. But the authorities shew that the objection only applies where the first trial was abortive because of some defect in the indictment or judgment. *Drury*, 3 C. & K. 193; 18 L. J. M. C. 189; 3 Cox C. C. 544 (1849); *Bowman*, 6 C. & P. 101, 337 (1834); *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. M. C. 101; 33 L. T. 9; 23 W. R. 691 (1875). It cannot arise because insufficient evidence, or no evidence at all, is given. The test is whether upon any evidence which could have been given on the first occasion, appellant could have been convicted of manslaughter *Sheen*, 2 C. & P. 635 (1827), where the Sessions Papers shew that the first trial was stopped at an early stage on a technical point; *Dann*, above. The practice is, where it is proposed to try only one of two similar indictments, to take that first, and offer no evidence upon the other afterwards, to avoid this very difficulty (*cf.* 1 East P. C. 371). If that had been done, I could not have complained. Nor can it make any difference that Darling J. told the jury there was another indictment to be tried, for the case must be treated as if it had been tried out, and if

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it had been, the jury could not properly have been directed that although there was evidence of manslaughter, they must not, for any reason, reduce the charge. If a verdict of murder had thus been secured, it must have been quashed. The Court cannot in this case act upon the proviso to s. 4 (1) of the Criminal Appeal Act, because the conviction here is based upon two verdicts: (1) "not *autrefois acquit*," and (2) "guilty." The appellant only asks for the first to be set aside, and if that is done he is entitled to judgment; he does not ask the Court to interfere with the second verdict. Therefore the fact that that is a proper one cannot empower the Court to refuse to set aside the other.

[PHILLIMORE J.: Appellant having pleaded "not guilty," what right had he to plead the inconsistent plea of *autrefois acquit*?

PICKFORD J. cited *Strahan, &c.*, 7 Cox C. C. 85 (1855), and *Langmead* v. *Maple*, 18 C. B. N. S. 255 (1865).]

Carr: Langmead v. *Maple* was a Chancery case and has no application to criminal law. The pleas are not inconsistent; the plea of *autrefois acquit* usually ends with a plea over to the felony, and where it does not, the Court has allowed a plea of "not guilty" to be entered after it has been disposed of (*Drury*, above). This is the converse case, and Darling J. having allowed it, in the exercise of his discretion, this Court cannot now review it. This point was not taken at the trial and cannot now be relied upon. The Criminal Appeal Act gives the Court no power to review the discretion of the judge at the trial, especially against the prisoner; the Act, except in the matter of appeal to the House of Lords, is intended to operate exclusively in the prisoner's favour. *Autrefois acquit* is a plea in bar, not a plea in abatement, and the rule that such a plea must be pleaded first applies only to pleas in abatement.

Travers Humphreys, for the Crown, doubted whether the objection that appellant had already pleaded to the indictment was now open to the Crown, not having been taken at the trial, but took the point by direction of the Court. This appellant was never in peril for manslaughter on the inquisition. There is no

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technical meaning in "peril," it is in each case a question of fact for the jury. *Lea and others*, 2 Mood. C. C. 9 (1837). Here appellant was never in fact in peril of anything, the proceeding was purely formal, and conducted in his own interest. Still less was he in peril for manslaughter, because both counsel for the Crown and Darling J. expressly withdrew that from the jury. In any case the Court can apply the proviso to s. 4 (1), which cannot be limited in any technical way, but means that the Court are not to interfere if they are satisfied that a guilty man has been properly convicted.

Carr, in reply: It is, no doubt, a question of fact whether defendant has been in peril, and on that the jury must be properly directed Here the facts were never in dispute, but it is submitted Darling J. wrongly interpreted "peril." *Sheen*, above.

The Lord Chief Justice: This appellant was found guilty of manslaughter. Previously he and another person had been charged with murder on the coroner's inquisition, when no evidence was offered, with the approval of the judge, who stated that there was also an indictment for manslaughter on the same facts. When that indictment came to be tried, Mr. Carr, who was defending at the request of the judge, took a new point: he wished to add another plea, *autrefois acquit*. The learned judge accepted it, but afterwards ruled that there was no evidence of it. We have had a very interesting argument to the effect that, inasmuch as on the murder charge, appellant could have been convicted of manslaughter, he had been in peril for manslaughter before. It is a grave question whether he was in actual peril: on that point the Court expresses no opinion, certainly not one favourable to appellant. But the plea is one of the highest technicality, as is shewn by the fact, that if the prosecution had proceeded with the indictment for manslaughter first, it is admitted that the point could never have arisen. Therefore the plea has no merits, and being a technical plea may be met by an equally technical objection. One of my brothers has pointed out that, as the appellant had already pleaded not guilty, this plea ought never to have been allowed at all. It is inconsistent with the plea already on the record. It is true it was accepted by Darling J., but there was no argument, and

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this Court can take the objection. It is not a case of overruling discretion, for none has been exercised. It is doubtful whether in any circumstances double pleas can be allowed. In coming to this conclusion we are certainly not contravening the Criminal Appeal Act. We do not rely upon the proviso to s. 4 (1), but upon that sub-section itself. It has not been made out that "upon any ground there has been a miscarriage of justice." Sentence may run from the date of conviction.

Appeal dismissed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRANCE, AND MR. JUSTICE PICKFORD.

JANE BLATHERWICK.

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Jane Blatherwick.

The rule as to corroboration of an accomplice's evidence in Wilson and Others (6 *Cr. Ap. R.* 125; 1911) *confirmed.*

Appellant was convicted at Liverpool Assizes on July 6th, 1911, before Lush J. for using an instrument to procure miscarriage, and sentenced to seven years' penal servitude.

Lindon Riley, for appellant (under s. 10 of the Criminal Appeal Act), who was present. The story of the prosecution was that a woman went with her husband and a female friend from Horwich to appellant's house at Wigan on a certain day, and that the operation was there and then performed. The husband and the friend were both called, but both were accomplices. Both stated that the appellant sent them out to a public-house for special whisky. The corroboration relied on was (1) that of a barman at a public-house, close to appellant's house, who deposed to serving a man and woman who came together with special whisky on that day, and (2) the fact that the subject of the alleged operation had died at a date consistent with the performance of an operation on the day alleged. This is no corroboration, implicating the accused, such as is required. *Everest*, 2 Cr. App. R. 130; 73 J. P. 269 (1909); *Tate*, (1908) 2 K. B. 680; 77 L. J. K. B. 1043; 72 J. P. 391; 99 L. T. 620; 1 Cr. App. R. 39; *Wilson and others*, 6 Cr. App. R. 125 (1911).

[THE LORD CHIEF JUSTICE: *Everest* goes too far; *Wilson* is the correct statement of the law.]

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Blatherwick.

The case should have been withdrawn from the jury, and in that belief it may have been that appellant did not give evidence. She ought not to be prejudiced because of that.

A. J. Lawrie for the Crown. The corroboration is no doubt very weak, but although the story of the prosecution was uncontradicted, the case for the defence was that these people never came to appellant's house at all. That being so, the fact that they were seen close to her house on the day in question, buying whisky which they said she sent them to fetch, is something. The date of the woman's death is also not irrelevant. In any case, there was a sufficient caution: *Wilson*, above.

The Lord Chief Justice: This Court has three times laid down that a case cannot be withdrawn from the jury for want of corroboration, unless it is required by statute. A strong caution is needed, but where that is given we cannot interfere. In this case the learned judge gave the caution, but told the jury that some corroboration was to be found in the incident of buying the special whisky. It is objected on behalf of the appellant that he ought to have said it was not corroboration; but, the case for the appellant being that the people were never in her house, we think that is some corroboration. And although the fact that appellant was not called is not of itself corroboration, we think it entitles a jury to act where perhaps they would not otherwise have done so. In any case we think there was no miscarriage of justice.

Appeal dismissed.

A. S. C.

FREDERICK ARTHUR BELLIS.

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Frederick Arthur Bellis.

A certificate of birth put in, coupled with proof that a certain person had always been treated as the person mentioned therein, may be sufficient evidence for a jury of that person's age.

Appellant was convicted at Chester Assizes on July 8th before Bray J. of unlawful carnal knowledge of a girl under sixteen. Sentence was postponed, and bail was allowed. This was an appeal against conviction on certificate.

A. S. Carr for appellant (under s. 10 of the Criminal Appeal Act), who was present. The point on which the certificate was granted was the proof of the girl's age. She was an inmate of a poor-law school, where appellant was band-master. A birth certificate was produced in the name which she bore, but independent evidence is required to connect the girl with the certificate. *Birt* v. *Barlow*, 1 Doug. 171 (1779). The only evidence given was that of the clerk to the guardians, who produced an order of justices, made in 1901, charging this girl upon his union, and deposed that at that time enquiries were made in his department which then satisfied him that this was the girl referred to in the birth certificate, so that he advised the board not to appeal against the order. This was mere hearsay—in fact, doubly so. The order of justices was not admissible, and even if evidence of repute is admissible in such a case, it only amounts to shewing that the clerk to the guardians did not think it worth while, on the evidence then before him, to advise his board to appeal. The fact that the girl was treated in the institution as being of the age stated only goes back to these same enquiries.

Sutton, for the Crown, cited *Weaver*, L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 29 L. T. 544; 22 W. R. 190; 12 Cox C. C. 527 (1873). He was stopped by the Court.

The Lord Chief Justice: The certificate is sufficient evidence that the child therein referred to was born on the date stated. That is not disputed. Then five years later a question arose as to whether this was the same girl; an order was made charging her maintenance upon this union. The clerk to the

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Frederick Arthur Bellis.

guardians, in the exercise of his duty, satisfied himself that the order was correct. Moreover, children are not kept in this institution after the age of sixteen. There was therefore evidence that this girl had always been treated as being the girl mentioned in the certificate. This was in our opinion sufficient for the jury.

Appeal dismissed.

A. S. C.

Emily Joy.

EMILY JOY.

Severity of sentence.

Appellant pleaded guilty at Barnstaple Borough Sessions on July 8th to two charges of larceny, and was sentenced to three years' penal servitude. She now, by leave of Avory J., appealed against sentence.

Appellant in person.

A. J. Lawrie, for the Crown, admitted that the sentence was too severe.

Pickford J.: Appellant pleaded guilty to two charges of larceny, and four others were taken into consideration. There was only one previous conviction on indictment, when she was sentenced to one month's imprisonment with hard labour, and one summary conviction punished by a fine. The sentence is too severe, and we will substitute one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. S. C.

JOHN REUBEN PARKER.

1911
29 *July.*
John Reuben Parker.

Conviction quashed where, in the opinion of the Court, the jury had not given defendant the benefit of a grave doubt.

Appellant was convicted at Lincoln City Assizes on June 26th before Pickford J. of rape, and sentenced to three years' penal servitude. He now, by leave of the full Court, appealed against conviction.

T. D. Lawrance, for appellant (under s. 10 of the Criminal Appeal Act), who was present. This case turned entirely on evidence of identity. The story of the prosecutrix from the beginning was that her assailant was wearing blue overalls. She saw appellant in the street, and at once charged him with the offence, and then told him that he was wearing blue overalls at the time. He at once denied it, and asked her to give him into custody and formulate her charge if she believed in it. For some reason this was not done until a week later. At the trial it was not suggested that appellant ever wore or possessed any such overalls. It was a case of mistaken identity, but in spite of a strong warning by Pickford J., the jury convicted, probably because prosecutrix adhered to her identification very strongly.

Sandlands, for the Crown. Prosecutrix had ample opportunity of seeing appellant's face, the offence having apparently taken place under a lamp. It was more likely, from the nature of the assault, that she would notice his features than his clothes. There was ample evidence for the jury, who may have thought that, although she made a mistake about a portion of the clothing, she was right about the man.

The Lord Chief Justice: This is a case of very great difficulty. There was evidence before the jury upon which they could act. The girl was very respectable, and had been badly outraged, and they may have been carried away by the feeling that, for the honour of their town, somebody ought to be punished for it. But her identification depended throughout on the blue overalls, and it is hardly possible she could have been mistaken in thinking that her assailant was so dressed. Appellant gave his right

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John Reuben Parker.

name and address when she spoke to him in the street, and challenged prosecution. There is, therefore, a sufficient doubt as to the accuracy of the verdict for us to give appellant the benefit of it. That was evidently the view formed by Pickford J. at the trial.

Conviction quashed.

A. S. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE HAMILTON.

ALEXANDER GOODBRAND.

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Alexander Goodbrand.

Sentence reduced in view of incorrect information given to the Judge at the trial.

This was an appeal against sentence, by leave of the full Court. Appellant pleaded guilty to a charge of bigamy at Bristol Assizes on July 3rd, and was sentenced by Lord Coleridge J. to eighteen months' imprisonment with hard labour.

Daw, for appellant (under s. 10 of the Criminal Appeal Act), who was not present. Lord Coleridge J. was under the mistaken impression that appellant deserted the woman whom he married on the second occasion. In fact he was a sailor, and went on a trip, giving the woman part of his wages before he went away, and sending her several sums after he left. Moreover, appellant had been in prison four months awaiting trial.

Croom-Johnson, for the Crown. Even if appellant did not desert this woman, after her child was born, he seduced her by the pretence of marriage, which was the matter which chiefly weighed with Lord Coleridge J.

The LORD CHIEF JUSTICE: It now appears, from enquiries which have been made by the order of this Court, that the statement in appellant's notice of appeal is accurate, and Lord Coleridge J. was wrongly informed as to the desertion, and that the second woman had no occasion to complain in that respect. Nevertheless, it is not a merely nominal bigamy, but a very serious offence. Appellant had been married only a very few years before, and had absolutely no reason to suppose that his wife

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Alexander Goodbrand.

was not alive. Then he practically seduced this young woman, who appears to be most respectable. There must be a substantial sentence, but in view of the fact that appellant had been four months in prison, it will be reduced to fourteen months' imprisonment with hard labour.

Sentence reduced.

A. S. C.

Leo Adolph Schmidt.

LEO ADOLPH SCHMIDT.

Conviction quashed in view of fresh evidence, inadvertently not called at the trial.

Appellant was convicted at London County Sessions on July 13th of larceny, and sentenced to three months' imprisonment in the second division and to expulsion. He now appealed against conviction, and called further evidence, by leave of the full Court.

H. D. Roome, for appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant is a foreigner and understands English only moderately: he was not represented at the trial. He was convicted of stealing some clothes from a house: he walked into the house and straight up to a room on the second floor, the door of which he opened. There was some evidence that the clothes had been moved, but they were not taken out of the room. Appellant was stopped as he was leaving the house, but could give no intelligible account of himself, and was given into custody. His defence was that at the house next door in the room corresponding to that which he had entered lived a friend of his with whom he had left his own clothes, for which he intended to call; and that the houses being similar he had mistaken the number. At the trial he wished to call this friend and his wife, and gave the police their names; but although they were brought to the Court by the police, for some reason appellant was not informed, and they were not called. They were now called before this Court and corroborated appellant's story, which he himself (not having given evidence on oath at the trial) now repeated. A former employer was also called as to character.

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Leo Adolph Schmidt.

Hawtin, for the Crown. At the trial appellant was understood to say that he himself lived at the next house, and the jury, being informed by the police, quite accurately, that this was not so, no doubt disbelieved appellant.

DARLING J.: This is a case of some difficulty, but the appeal must be allowed. These witnesses were brought to the Court at appellant's request by a detective, but appellant did not see them, and it is not clear whether he knew that they were there. He is a foreigner, and was no doubt somewhat confused. If these witnesses had been called the jury might have decided in his favour. They asked where he lived, which shewed that they were uncertain as to the truth of his statement, and the answer which they received was, in the circumstances, misleading.

Conviction quashed.

A. S. C.

HARRY CONLON AND ARTHUR RICHARDSON.

Harry Conlon and Arthur Richardson.

Severity of sentence—Whipping.

Appellants were convicted on July 21st at Leeds Assizes of robbery with violence, and sentenced by Scrutton J., Conlon to eighteen months' and Richardson to twenty-one months' imprisonment with hard labour, and each to twenty-four lashes with the cat. They now appealed against sentence by leave of the Lord Chief Justice.

Appellants in person.

Mellor, for the Crown, handed in a statement by the Chief Constable of Leeds shewing the prevalence of this class of offence in the city.

THE LORD CHIEF JUSTICE: I granted leave in these cases, not from any doubt on my own part that the sentence is a proper one, but merely in order that appellants might have an opportunity of saying anything that they could on their own behalf.

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Harry Conlon and Arthur Richardson.

Nothing that they have said helps them at all. Having been convicted of robbery with violence, they are anxious, as such men generally are, to prevent any violence being done to themselves. They appear to be men who are in league with loose women, and rob men whom these women entice into their houses. There appears to be an outbreak of this class of crime in Leeds, and a state of terror which makes it very difficult to get witnesses to come forward. The cat is now very rarely inflicted, but this is just the kind of case in which it is necessary.

Appeals dismissed.

A. S. C.

Sarah Jones.

SARAH JONES.

In an indictment under s. 2 (1) of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885, it is not necessary to aver that the "girl" was "under twenty-one years of age."

Appellant was convicted at Glamorgan Assizes on July 24th, before Bray J., of procuration, and sentenced to six months' imprisonment in the second division. She now appealed on a case reserved by Bray J., as to the sufficiency of the indictment.

E. J. B. Herbert, for appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment was bad in that it omitted a material averment which is essential under the section upon which it was framed, viz., s. 2 (1) of the Criminal Law Amendment Act, 1885. The section refers to "any girl or woman under twenty-one," but the indictment charged simply "procuring a girl," omitting the age. That the age is under twenty-one must be both alleged and proved. The words "under twenty-one" govern both "woman" and "girl." There is no legal definition of "girl," and a female does not cease to be a girl when she is twenty-one. In s. 49 of 24 & 25 Vict. c. 100, which was repealed by the Criminal Law Amendment Act, the words were "woman or girl under the age of twenty-one." There clearly "under twenty-one" governed both "woman" and "girl."

Frank H. Gaskell, for the Crown, was not called upon.

1911
18 *August.*
Sarah Jones.

The Lord Chief Justice: Appellant was undefended at the trial, and this point was taken by Bray J. on her behalf. The Court is, however, of opinion, that to charge "procuring a girl" is sufficient without alleging the age. Every "girl" is under twenty-one, but many females are "women" in development and in every way, at eighteen or nineteen. The later statute is more grammatical than the earlier, but the meaning is unchanged.

Appeal dismissed.

A. S. C.

ANNIE KENT.

Annie Kent.

Severity of sentence in view of age.

Appellant was convicted before the Deputy-Chairman at London County Sessions on July 12th as an incorrigible rogue, and sentenced to eight months' imprisonment with hard labour. She now appealed against sentence by leave of Horridge J.

Appellant in person.

Travers Humphreys, for the Crown. The learned Deputy-Chairman was not aware when he passed sentence, that appellant was eighty-six years of age.

The Lord Chief Justice: The sentence is, in view of appellant's age, clearly excessive. It will be reduced to one of four months' imprisonment.

Sentence reduced.

Solicitors for the Crown—*Wontner and Sons.*

A. S. C.

1911
18 *August.*

Joseph William Tanner.

JOSEPH WILLIAM TANNER.

Reference by the Home Secretary in view of fresh evidence.

Reference by the Home Secretary.

Defendant, who was on bail, was convicted of incest on July 10th, 1910, at the Stafford Assizes, before Lawrance J., and sentenced to seven years' penal servitude. His application for leave to appeal was dismissed on August 19th, 1910.

The hearing was *in camera* and fresh evidence was called.

Counsel were *Graham Milward* for appellant; *Mackarness* for the Crown.

Conviction quashed.

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